Supreme Court, U.S.
FILED

No. 94 216 AUG - 2 1994

OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM 1994

JENO JAKABOVITZ,

Petitioner,

v.

ORLANDO CABRERA, LINDA McCOGGLE, JEANNETTE RAMSEY, on behalf of themselves, and all others similarly situated, OPEN HOUSING CENTER, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARVIN H. WOLF
Counsel of Record and
Attorney for Petitioner
Jeno Jakabovitz
3 Executive Court
Dix Hills, New York 11746
(516) 499-0030

Of Counsel:
Alan F. Katz
Jeffrey M. Garber

PRINTINGHOUSE PRESS 25 WEST 43RD STREET · NEW YORK NY 10036 (212) 719-0990

116 pp

QUESTIONS PRESENTED

(1) Is it contrary to the holding of this Court in *General Building*, 458 U.S. 375(1982), as well as an unconstitutional deprivation of due process, to infer as a matter of law, as the Second Circuit did, that a party's ability to withhold future business from another is tantamount to controlling that other party, thereby creating an agency relationship under Title VIII of the Civil Rights Act of 1968?

(2) Is it a violation of the principles established by this Court in *McDonnell Douglas*, 411 U.S. 792(1973), and *Burdine*, 450 U.S. 248(1981), as well as an unconstitutional deprivation of due process, for a judge to require a jury to determine such questions of law as whether a plaintiff has established a *prima facie* case, whether a defendant has met his burden of production and whether the presumption of discrimination has disappeared, in an action under Title VIII of the Civil Rights Act of 1968 and 42 U.S.C. §§1981 and 1982?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

I. REPORTS OF OPINIONS DELIVERED BELOW . . . 1

II. STATEMENT OF JURISDICTIONAL GROUNDS . . . 2

III. STATUTORY PROVISIONS 2

IV. STATEMENT OF THE CASE 5

1. BASES FOR FEDERAL COURT JURISDICTION . 5

2. PARTIES AND BACKGROUND 6

3. PROCEDURAL BACKGROUND 7

V. ARGUMENT IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI 8

1. THIS COURT SHOULD RESOLVE THE UNSETTLED SUBSTANTIAL QUESTIONS OF FEDERAL LAW UNDER 42 U.S.C. §§ 1981, 1982 AND 42 U.S.C. § 3601, ET. SEQ. PRESENTED HEREIN WHICH AFFECT ALL LANDLORDS AND BROKERS NATIONWIDE 8

2 IN HOLDING THAT WHENEVER ONE PARTY HAS THE POWER TO WITHHOLD FUTURE BUSINESS FROM ANOTHER, HE THEREBY CONTROLS THAT PARTY AND MAKES HIM HIS AGENT, THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION 9

3. THE SECOND CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *GENERAL BUILDING CONTRACTORS ASSOCIATION V. PENNSYLVANIA* 11

4. THE EXTENSION OF VICARIOUS LIABILITY TO A LANDLORD FOR THE ACTS OF AN INDEPENDENT AGENT WHOM HE DOES NOT CONTROL VIOLATES DUE PROCESS AND IS CONTRARY TO SOUND PUBLIC POLICY 12

5. THIS CASE RAISES ISSUES THE RESOLUTION OF WHICH WILL IMPACT ALL CIVIL RIGHTS CASES SUBJECT TO THE *MCDONNELL DOUGLAS* FRAMEWORK 16

6. THE CIRCUIT COURTS ARE IN DIRECT CONFLICT WITH ONE ANOTHER REGARDING HOW JURIES SHOULD BE INSTRUCTED IN CIVIL RIGHTS CASES 17

7. IN PERMITTING FLAWED AND UNCONSTITUTIONAL JURY INSTRUCTIONS TO STAND, THE SECOND CIRCUIT SANCTIONED A SUBSTANTIAL DEPARTURE BY THE DISTRICT COURT FROM THE DUE PROCESS REQUIREMENTS ESTABLISHED BY THIS COURT 18

8. JAKABOVITZ WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ONCE THE PRESUMPTIONS UNDERLYING PLAINTIFFS' CASE DISAPPEARED 19

VI. CONCLUSION 21

APPENDIX A A1
APPENDIX B A39

TABLE OF AUTHORITIES

U.S. SUPREME COURT

Pages

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) . . . . . i, 11, 12, 13, 15

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 17

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) . . i, 8

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) 19, 20

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) . . . . . i, 8

U.S. COURTS OF APPEALS

Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994) 1, 10, 14, 15, 17, 18, 19

City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (7th Cir. 1992) 9

Loeb v. Textron, 600 F.2d 1003 (1st. Cir. 1979) 16, 17, 18

Lynch v. Elden & Co., 882 F.2d 262 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990) 18

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306 (10th Cir. 1990) 17

Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988) 17

Northside Realty Associate, Inc., v. United States, 605 F.2d 1348 (5th Cir. 1979) 9

Ragin v. Harry Macklowe Real Estate, 6 F.3d 898 (2d Cir. 1993) 6

Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979) 8, 19

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) 18

Walker v. Crigler, 976 F.2d 900 (4th Cir. 1992). 9, 15

Williams v. Valentec Kisco, Inc., 964 F.2d 723 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 635 17

Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982) . . . 14

U.S. DISTRICT COURTS

Cabrera v. Fischler, 814 F. Supp. 269 (E.D.N.Y. 1993) . . . 1, 9

FEDERAL STATUTES

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 6

28 U.S.C. Section 1331 6

28 U.S.C. Section 1343(a)(4) 6

28 U.S.C. Section 2201 6

28 U.S.C. Section 2202 6

29 U.S.C. Section 631 16

42 U.S.C. Section 1981 . . . . . i, 2, 6, 8, 16

42 U.S.C. Section 1982 . . . . . i, 2, 6, 8, 16

42 U.S.C. Section 3601 . . . . . 2, 6, 8, 16

42 U.S.C. Section 3604 3

42 U.S.C. Section 3606 4

42 U.S.C. Section 3612(c) 4

42 U.S.C. Section 3613(c) 4

42 U.S.C. Section 3616 5

SUPREME COURT RULES

Supreme Court Rule 10.1(a) 18

Supreme Court Rule 10.1 (c) 17

Supreme Court Rule 13.1 2

FEDERAL COURT RULES

Fed. R. App. P. 4(a)(1) 6

Fed. R. Evid. 301 19

STATE STATUTES

N.Y. Real Prop. Law Section 440 16

Supreme Court of the United States

October Term, 1994

JENO JAKABOVITZ,

Petitioner

v.

ORLANDO CABRERA, LINDA McCOGGLE, JEANNETTE RAMSEY, on behalf of themselves, and all others similarly situated, OPEN HOUSING CENTER, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

I.
REPORTS OF OPINIONS DELIVERED BELOW

The decision of the United States District Court for the Eastern District of New York, Arthur D. Spatt, Judge, is reported in *Cabrera v. Fischler*, 814 F. Supp. 269 (E.D.N.Y. 1993).

The decision of the United States Court of Appeals for the Second Circuit, Jon O. Newman, Chief Judge, is reported in *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994).[1]

---

[1] There were only five parties to the proceeding in the Second Circuit Court of Appeals that is sought to be reviewed by this Court. They were Orlando Cabrera, Jeannette Ramsey, Open Housing Center, Inc., Jeno Jakabovitz, and Benjamin Breitman.

II.
STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the Second Circuit Court of Appeals was filed May 5, 1994.

The jurisdiction of this Court is grounded upon 28 U.S.C. Section 1254(1) and Supreme Court Rule 13.1.

III.
STATUTORY PROVISIONS

A. 42 U.S.C. Section 1981 (1983):

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

*(42 U.S.C. Section 1981 was amended November 21, 1991; the amendment has no bearing on this case).

B. 42 U.S.C. Section 1982 (1983):

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

C. 42 U.S.C. Section 3601 (1983):

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

D. 42 U.S.C. Section 3604 (1983):

"As made applicable by section 803 [42 USC §3603] and except as exempted by sections 803(b) and 807 [42 USC §§ 3603(b), 3607], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin."

*(42 U.S.C. Section 3604 was amended September 13, 1988; the amendment has no bearing on this case).

E. 42 U.S.C. Section 3606 (1983):

> "After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin."

*(42 U.S.C. Section 3606 was amended September 13 1988; the amendment has no bearing on this case).

F. 42 U.S.C. §3612(c) (1983):

> "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees."

*(42 U.S.C. §3612(c) was amended September 13, 1988. Pursuant to this amendment, the aforementioned Section was redesignated and now appears as 42 U.S.C. Section 3613(c)).

G. 42 U.S.C. Section 3613(c) (1988):

> "(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to

the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate). (2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other that the United States, a reasonable attorney's fee and costs.The United States shall be liable for such fees and costs to the same extent as a private person."

H. 42 U.S.C. Section 3616 (1983):

"The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this title. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register."

IV.
STATEMENT OF THE CASE

1. BASES FOR FEDERAL COURT JURISDICTION

This case was originally brought in the District Court for the Eastern District of New York against Emanuel Fischler d/b/a AM Realty Co., James Siegel, Carl Matos, Jeno Jakabovitz, and

Benjamin Breitman[2] seeking compensatory and punitive damages and injunctive and affirmative relief under Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act" or "Title VIII"), 42 U.S.C. §§3601, *et. seq.*; the Civil Rights Act of 1870 ("Section 1981"), 42 U.S.C. §1981; and the Civil Rights Act of 1866 ("Section 1982"), 42 U.S.C. §1982.

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§1331, 1343(a)(4), 2201, 2202, and 42 U.S.C. §§1981, 1982, and 3612.The District Court's judgment was formally entered on April 1, 1993.[3]

Jakabovitz appealed the District Court's final judgment to the Second Circuit Court of Appeals by filing a timely notice of appeal and an amended notice of appeal in the District Court on March 22, 1993 and April 13, 1993, respectively. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and Federal Rule of Appellate Procedure 4(a)(1).

2. PARTIES AND BACKGROUND

The Open Housing Center is a not-for-profit organization whose primary purpose is to promote equal opportunity in housing in New York. Plaintiffs Orlando Cabrera, Linda McCoggle, and Jeannette Ramsey were paid employees who acted as "testers"[4] for the Open Housing Center. In 1987, the Open Housing Center began an

---

2 Of these parties, only Jeno Jakabovitz has applied to this Court for a Writ of Certiorari.

3 This Judgment was stayed pending the final disposition of the Appeal to the United States Court of Appeals for the Second Circuit by Order of the District Court dated April 24, 1993.

4 "Testers" are "individuals who, without the intent to rent an apartment, pose as renters for the purpose of collecting evidence of unlawful steering away of prospective minority purchers by real estate agents." *Ragin v. Harry Macklowe Real Estate*, 6 F.3d 898, 904 (2d Cir. 1993).

investigation of AM Realty, a real estate brokerage firm, to see whether it was complying with a prior consent decree not to discriminate in providing housing services. On several occasions in 1987, the Open Housing Center sent a pair of testers of different races to AM Realty's offices to inquire about renting apartments in certain Brooklyn neighborhoods. The two testers in each pair presented a similar rental "profile," each claiming to have a family composition and income similar to the person with whom he or she was paired.

Jeno Jakabovitz is the owner and manager of a number of apartment buildings located in Brooklyn, New York. Jakabovitz had a non-exclusive listing agreement with AM Realty. In connection with their investigation of AM Realty, the Open Housing Center sent testers directly to Jakabovitz's offices. After completing their test of Jakabovitz, the Open Housing Center and the testers concluded that Jakabovitz had engaged in racial discrimination in the rental of housing. Thereafter, the Open Housing Center and the testers filed suit in the District Court pursuant to the Fair Housing Act and Sections 1981 and 1982.

3. PROCEDURAL BACKGROUND

After a two-week trial, the jury rendered a verdict largely in favor of the plaintiffs. The jury found that Jakabovitz had discriminated against one of the testers in violation of the Fair Housing Act and Sections 1981 and 1982.

The jury's special verdict also decided issues of vicarious liability. The jury found that Emanuel Fischler, who was doing business as AM Realty, had acted as the agent of Jakabovitz with regard to the events at issue. Based upon these findings, the jury held Jakabovitz liable for the discriminatory acts of his purported agent, AM Realty. Judgment was then entered imposing liability against Jakabovitz for compensatory and punitive damages, injunctive and affirmative relief, and attorney's fees.

During the trial, Jakabovitz moved in writing for a directed verdict, and in a post-trial motion, to set aside the jury's verdict. The basis for these motions was that the District Court erred in submitting the case to the jury despite plaintiffs' failure to establish "availability," one of the essential elements of the plaintiffs' *prima facie* case.[5]

V.
ARGUMENT IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI

1. THIS COURT SHOULD RESOLVE THE UNSETTLED SUBSTANTIAL QUESTIONS OF FEDERAL LAW UNDER 42 U.S.C. §§ 1981, 1982 AND 42 U.S.C. § 3601, ET. SEQ. PRESENTED HEREIN WHICH AFFECT ALL LANDLORDS AND BROKERS NATIONWIDE

Prior to the decision of the Court of Appeals in this case, independent, state-licensed real estate brokers were not deemed to be the agents of landlords. As noted by District Court Judge Arthur D. Spatt, this case is one of first impression concerning the circumstances under which landlords may be held liable to third

---

[5] This case involves the familiar three-step formulation of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In these seminal cases, the Supreme Court set forth the allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. The Second Circuit adopted the legal framework of *McDonnell Douglas* and applied it to housing discrimination cases under Title VIII. *See Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979). In *Robinson*, the Court set forth the four components of the plaintiff's *prima facie* case: (1)that plaintiff is black; (2) that plaintiff applied for and was qualified to rent or purchase housing; (3) that plaintiff was rejected; and (4) that the housing opportunity remained available. *Id.* at 1038. If established, "a *prima facie* inference of discrimination arises as a matter of law." *Id.*

parties for acts of discrimination by real estate brokers acting on their behalf. *Cabrera v. Fischler*, 814 F. Supp. 269, 273-274 (E.D.N.Y. 1993).

Under the existing body of "federal law", which governs the issue of whether an agency relationship exists for purposes of the Fair Housing Act, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992); *Northside Realty Assoc., Inc., v. United States*, 605 F.2d 1348, 1354 n. 13 (5th Cir. 1979), real estate agencies have been held liable for the discriminatory acts of the brokers they employ, *see City of Chicago v. Matchmaker Real Estate Sales Center, Inc., supra*, and landlords have been held liable for the discriminatory acts of their managing agents who are employees of the landlords, *see Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992). But never before has a landlord been held vicariously liable for the discriminatory acts of an independent real estate broker without actual evidence establishing that the landlord controlled the actions of the broker.

2. IN HOLDING THAT WHENEVER ONE PARTY HAS THE POWER TO WITHHOLD FUTURE BUSINESS FROM ANOTHER, HE THEREBY CONTROLS THAT PARTY AND MAKES HIM HIS AGENT, THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

In a radical and complete departure from well-established precedent, the Second Circuit has eliminated the need for factual evidence of "control" in demonstrating the existence of an agency relationship. An agency can now be deemed to exist as a matter of law merely from one party's power to withhold future business from another.

At bar, not only did Jakabovitz decline to give broker AM Realty an exclusive listing, he listed his vacant apartments with several other brokers in the area and actively sought to rent the apartements himself. Plaintiffs utterly failed to supply any evidence that Jakabovitz controlled the actions of AM Realty or those of any other broker competing to rent the apartments, yet the Second Circuit found that the "power to withhold business" is tantamount to control. The Court stated:

> There was sufficient evidence also to indicate that the landlords controlled AM Realty's activities in referring candidates for these apartments. Both landlords had the power to deny further listings to AM Realty if the brokerage referred unacceptable applicants for the apartments.

Cabrera v. Jakabovitz, 24 F.3d at 387.

While the Second Circuit thought it was making a factual evaluation of the evidence, it in effect substituted a legal determination for a factual one. In equating factual control with the *power* to refuse business, the Court created an agency where none had existed.[6] If the power to withhold future business — a Constitutionally protected right of contract enjoyed by every citizen of the United States — is identical to the power to control, there is no need for a factual determination of the issue of control. As a matter of law, a landlord is rendered vicariously liable under the doctrine of *respondeat superior* to third parties for any act of discrimination by a broker or a broker's salespeople.

---

[6] Despite the Second Circuit's characterization of the existence of an "agency" as a mixed question of law and fact, this characterization appears only to apply to two of the three elements of the agency relationship. Once parties agree to do business together, the elements of manifestation of consent and acceptance are satisfied. *See Cabrera v. Jakabovitz*, 24 F.3d at 385-388.

3. THE SECOND CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *GENERAL BUILDING CONTRACTORS ASSOCIATION V. PENNSYLVANIA*

The Second Circuit's decision runs counter to the principles established by this Court in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982). In *General Building*, this Court explicitly stated that in order for an agency to exist, there must be control and a fiduciary relationship.[7] As a matter of law, economic relations between parties are not determinative of and cannot be equated with the element of control in a principal-agency relationship. *General Building*, 458 U.S. at 393-395 ("the power to oppose" is not tantamount to a "right to control."). Indeed, as this Court has observed, a rule equating the two would convert every contractual relationship into an agency:

> The facts emphasized by respondents, standing alone, are inadequate. That the employers fund the activities of the [purported agent] does not render the [purported agent] the employers' servant or agent any more than an independent contractor is rendered an agent simply because he is compensated by the principal for his services.

General Building, 458 U.S., at 394-395.

The Second Circuit Court of Appeals has totally ignored or completely flouted this Court's specific holding that "control" cannot be predicated merely on one party's right to withhold future business from another. *Id.* at 393-395. Applying the reasoning of

---

[7] "At the core of agency is a 'fiduciary relation....'" *General Building*, 458 U.S. at 393, *citing* Restatement (Second) of Agency §1.

the Second Circuit to the facts of *General Building*, leads to a result at odds with what this Court in fact held.[8]

4. THE EXTENSION OF VICARIOUS LIABILITY TO A LANDLORD FOR THE ACTS OF AN INDEPENDENT AGENT WHOM HE DOES NOT CONTROL VIOLATES DUE PROCESS AND IS CONTRARY TO SOUND PUBLIC POLICY

The Second Circuit's expansive view of vicarious liability extends to parties who have minimal commercial contact with independent business entities. It imposes liability even if the discrimination occurs surreptitiously in the offices of those independent businesses.[9]

---

[8] In *General Building*, 458 U.S. 375, this Court stated that, "Even if the doctrine of *respondeat superior* were broadly applicable to suits based on §1981, ... it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship." *Id.* at 392. *See also, id.*, n.18: "In this case, the associations were held liable because they negotiated an agreement, fair on its face, which was later implemented by another party in a manner that was not only discriminatory but in violation of the agreement itself and in a manner in which the associations were neither aware nor had any reasons to be aware...." Likewise at bar, the fact that Jakabovitz authorized AM Realty to ascertain whether the prospective tenants had the financial means to reside in one of his buildings did not make AM Realty the agent of Jakabovitz by simply referring to him prospective tenants that conformed to his racially-neutral financial-means qualifications.

[9] Examples of such discrimination would include black clients who are made to wait longer than whites for service, are not treated with the same courtesy, and do not have their phone calls returned on a timely basis. Since the instant decision expressly encompasses Title VII discrimination, landlords would also be liable if a broker failed to treat black *employees* in the same manner he treats white employees.

The doctrine of *respondeat superior* cannot be constitutionally applied to hold a landlord responsible for the discriminatory acts of an independent broker in the absence of a fiduciary relationship or evidence of knowledge or control.[10] By holding otherwise, the Second Circuit and District Court violated Jakabovitz's due process rights and directly contradicted the holdings of this Court and the requirements of sound public policy.

The attempt to justify such an expansion of vicarious liability does not withstand scrutiny. The Second Circuit stated:

> We believe that our decision will not harm the business of renting apartments, whether or not brokers are used. First, public policy certainly does not favor the use of brokers who engage in the repugnant practice of racial steering. Our decision will only increase the costs of using brokers who discriminate, and thereby potentially reduce such discrimination. Second, landlords need not be dissuaded from using brokers because of their fear that they will be held liable if the brokers discriminate. Landlords will be able to allay this concern by looking over the racial composition of the broker's referrals for any sign of discrimination. While this examination will not prove that a broker is discriminating, it will at least alert the landlord to that possibility and allow the landlord to take appropriate steps to avert such discrimination. Finally, instead of frustrating public policy goals, we believe that our decision will actually further the

---

[10] Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and consent by the other to so act. *General Building*, 458 U.S. at 393, *citing* Restatement (Second) of Agency §1.

> purposes of the Fair Housing Act: "The Provisions of 42 U.S.C. §3604 are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially segregated housing with 'truly integrated and balanced living patterns.'" *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982)(*quoting*, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)(*quoting* statement of Senator Walter Mondale, 114 Cong. Record 3422)).(Footnote omitted).

Cabrera v. Jakabovitz, 24 F.3d at 388.

By its holding, the Second Circuit Court of Appeals has made landlords guarantors of those with whom they contract by imposing on them a new *affirmative* duty to oversee the racial composition of broker referrals for any hint of discrimination.

This is an unrealistic and unworkable rule which cannot be constitutionally applied. Much of what occurs in a broker's office relates to the internal operation of *his* business and cannot be imputed to any particular landlord. To comply with the Second Circuit's new standard, a landlord would have to monitor the activities in the offices of any and all brokers he uses to satisfy himself that no discrimination is taking place. This standard is untenable given the fact that, like Jakabovitz, most landlords list with several brokers at one time. Not only will monitoring brokers raise the cost of using brokers, since monitoring is presumably necessary to differentiate the "good" brokers from the "bad," it is unlikely that a broker who discriminates will give a landlord access to the information necessary for him to become "alert[ed]... to that possibility and allow the landlord to take appropriate steps to avert such discrimination." *Cabrera v. Jakabovitz*, 24 F.3d at 388. Although the Second Circuit acknowledges that such supervision of a broker's business practices will not necessarily ferret out evidence

that a broker is discriminating, the Court is apparently oblivious to the fact that monitoring will not definitively prove that a broker is *not* discriminating.

Moreover, as this case shows, a landlord can be held liable on the basis of a single instance of discrimination by a broker, even before the landlord has any meaningful opportunity to gather information regarding that broker's practices. Hence a landlord is always at risk of being held vicariously liable despite his best efforts to counter discrimination.

A landlord does not have an affirmative obligation to guarantee that third parties are not discriminated against by independent contractors with whom he does business. The non-delegable duty not to discriminate only requires that the duty-holder himself must ensure that he does not discriminate. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 396 (1982). Thus, the doctrine of non-delegable duty is not a legally sufficient ground for imposing liability upon a landlord for the acts of the independent broker. Notwithstanding its statement to the contrary,[11] the Second Circuit has imposed an affirmative duty upon landlords for the benefit of potential third party victims of discrimination. This Court should not sanction such a departure from its precedent and such an extension of the non-delegable duty doctrine.

---

[11] The Second Circuit noted that "[b]ecause we decide that the landlords are liable for AM Realty's discrimination under traditional doctrines of *respondeat superior*, we do not need to consider whether they might also be liable because landlords may have a non-delegable duty not to discriminate. *See General Building*, 458 U.S. at 395-96 (defining non-delegable duty); *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992)(holding that property owner's duty not to discriminate in leasing or sale of property is non-delegable)." *Cabrera v. Jakabovitz*, 24 F.3d at 388 n.16.

The Court of Appeal's holding in the instant case also conflicts with the public policy of the Fair Housing Act and the laws of the State of New York, both of which favor the use of real estate brokers to facilitate the rental and purchase of property. *See* N.Y. Real Prop. Law §440 *et. seq.* (Consol. 1980); 42 U.S.C. 3601 *et. seq.* (Law. Co-op. 1983 & Supp. 1993).

The Second Circuit Court of Appeals has created a new legal standard which fundamentally alters the relationship and responsibilities of landlords and brokers. Because of the potential liability stemming from mere association with those who would discriminate, landlords will now be less inclined to utilize the services of independent brokers. Presently, a landlord has no effective means by which he can protect himself from vicarious liability aside from declining to use brokers. This result not only undermines the brokerage business, but makes it more difficult for a member of the public to locate available housing and for landlords to find prospective tenants or buyers.

5. THIS CASE RAISES ISSUES THE RESOLUTION OF WHICH WILL IMPACT ALL CIVIL RIGHTS CASES SUBJECT TO THE *MCDONNELL DOUGLAS* FRAMEWORK

In the vast majority of cases, where direct evidence of discrimination is not available, the *McDonnell Douglas* framework has been adapted to suit the context at issue, whether it be allegations of discrimination in employment (Title VII), discrimination in housing (Title VIII), Civil Rights violations (42 U.S.C. §§1981 and 1982) or age-based discrimination (29 U.S.C. §631). *See Loeb v. Textron*, 600 F.2d 1003 (1st. Cir. 1979).[12] Chief Judge Jon O.

---

[12] The *McDonnell Douglas* framework is based on the notion that by ruling out the more obvious reasons for denying someone an opportunity, a complainant

Newman, writing for the Second Circuit, stated that "[T]his appeal presents important issues concerning the framing of jury instructions in all types of discrimination cases." *Cabrera v. Jakabovitz*, 24 F.3d at 377.

As the *McDonnell Douglas* formulation did not arise in the context of a jury trial, *Loeb*, 600 F.2d at 1016, its adaptation into a meaningful and clear jury instruction has proved difficult to accomplish. This is "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c).

6. THE CIRCUIT COURTS ARE IN DIRECT CONFLICT WITH ONE ANOTHER REGARDING HOW JURIES SHOULD BE INSTRUCTED IN CIVIL RIGHTS CASES

There is considerable disagreement among the Circuit Courts with respect to how a jury should be instructed and what its functions are under the *McDonnell Douglas* framework. With its decision in the instant case, the Second Circuit has definitively joined the approach utilized by the Eighth Circuit,[13] the Tenth Circuit[14] and the Fourth Circuit ,[15] and aligned itself against the position taken by

---

can create an inference of some tainted reason for his rejection. *Loeb v. Textron*, 600 F.2d at 1013. As this Court made clear in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977), "a *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors."

[13] *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 635.

[14] *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308-09 (10th Cir. 1990).

[15] *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988).

the First[16] and Seventh Circuits.[17] This Court needs to resolve this ongoing conflict among the circuits on this important Federal Question. Supreme Court Rule 10.1(a).

7. IN PERMITTING FLAWED AND UNCONSTITUTIONAL JURY INSTRUCTIONS TO STAND, THE SECOND CIRCUIT SANCTIONED A SUBSTANTIAL DEPARTURE BY THE DISTRICT COURT FROM THE DUE PROCESS REQUIREMENTS ESTABLISHED BY THIS COURT

Acknowledging that a portion of the instructions the District Court gave the jury were flawed, *Cabrera v. Jakabovitz*, 24 F.3d at 381-382, 383, the Court of Appeals set forth its view of the respective roles of judge and jury. In essence, the Second Circuit held that there is no need to instruct the jury with respect to the first two steps of the *McDonnell Douglas* framework, i.e., whether the plaintiff established a *prima facie* case and whether the defendant met his burden of production. *Id.* at 381-382. These determinations, the Court held, are within the province of the court to rule upon as

---

[16] *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987). In *Rowlett*, the First Circuit in fact reversed its earlier position of not informing a jury as to the intricacies of the *McDonnell Douglas* framework, in favor of informing the jury regarding the legal obligations of the parties. *See Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). The First Circuit explained its reasoning thus: "Although this framework was considered complicated and cumbersome when it was first used in *McDonnell Douglas*, with repeated use courts have become more comfortable with it, both for their own use in ruling on Title VII claims and for the jury's use in ruling on intentional discrimination.... It is a straightforward way of explaining how to consider whether there is intentional discrimination in situations where such discrimination is not likely to be overt." *Rowlett*, 832 F.2d at 200.

[17] *Lynch v. Elden & Co.*, 882 F.2d 262, 265-66 (7th Cir. 1989)(approving use of instruction setting out *McDonnell Douglas* analysis, including references to "*prima facie* case."), *cert. denied*, 493 U.S. 1080(1990).

a matter of law. *Id.* Given this analysis, the District Court's repeated instructions to the jury regarding the determination of whether a *prima facie* case existed and the "presumption of discrimination," which had already disappeared from the case as a matter of law, mandate reversal. The Second Circuit's affirmance of the hopelessly muddled and clearly erroneous jury instructions cannot be sanctioned by this Court, as they constitute a fundamental misstatement of the law and a deprivation of Jakabovitz's right to due process.

8. JAKABOVITZ WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ONCE THE PRESUMPTIONS UNDERLYING PLAINTIFFS' CASE DISAPPEARED

The presumption of discrimination which the jury is entitled to employ is dependent upon the existence of adequate proof supporting each of the four elements of the plaintiff's *prima facie* case,[18] and operates in like manner to all presumptions under Rule 301 of the Federal Rules of Evidence.[19] *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747, 2749(1993). In order for the plaintiff to avail himself of this legal presumption, the plaintiff's *prima facie* case must remain intact,[20] and the defendant must fail

---

[18] The four elements are: (1) that plaintiff is black; (2) that plaintiff applied for and was qualified to rent or purchase housing; (3) that plaintiff was rejected; and (4) that the housing opportunity remained available. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038. At bar, only the fourth element is in issue.

[19] "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." Rule 301, Federal Rules of Evidence, *quoted in Hicks*, 113 S. Ct. at 2747.

[20] *See, Hicks* 113 S. Ct. at 2749("together with the elements of the *prima facie* case").

to come forward with evidence sufficient to meet his burden of production. *Id.* at 2749. While at bar the plaintiffs may have initially satisfied those elements with the aid of a presumption — that an apartment that was available an hour before, would continue to be available an hour later — Jakabovitz was nevertheless entitled to a directed verdict once he conclusively rebutted the evidence underlying the necessary element of availability.[21] A presumption, particularly one of "fact," which is merely a permissive inference, disappears once contrary evidence has been introduced. Thus, once unrefuted documentary and testimonial evidence of the unavailability of the apartment is introduced, no presumption and no question of fact exists to submit to a jury, unless the plaintiff produces some actual proof of availability. The plaintiffs in the case at bar failed to produce such proof.

---

[21] A defendant is entitled to a judgment as a matter of law if "the plaintiff's *prima facie* case is held to be inadequate in law..." *Hicks*, 113 S. Ct. at 2748 n.3. By reversing the order of the white and black tester, plaintiffs failed to establish the availability of the apartment by either direct or circumstantial evidence. Plaintiffs did not submit any actual evidence of availability, and relied exclusively on the presumption of continuity. That presumption disappeared once Jakabovitz offered contrary evidence. At that point, plaintiffs had to offer actual proof of availability or face judgment against them as a matter of law. *See Hicks*, 113 S. Ct. at 2748-49, 2753.

VI.
CONCLUSION

This Court should take the opportunity that this case presents to resolve the widening disagreement among various Circuit Courts regarding the role of the judge and jury with respect to the *McDonnell Douglas* framework. This Court is also presented with the opportunity to set meaningful Constitutional limits to the application of vicarious liability in Civil Rights cases. Jakabovitz has preserved these issues for this Court's review. We pray that this Court applies its discretion and grants Jakabovitz a Writ of Certiorari to review the important issues of federal law raised herein.

Respectfully submitted,

Marvin H. Wolf
Attorney for Petitioner:
Jeno Jakabovitz
3 Executive Court
Dix Hills, New York 11746
(516) 499-0030

Of Counsel: Alan F. Katz
Jeffrey M. Garber

APPENDICES

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 317, 318, 510—August Term 1993

Argued: October 12, 1993; Decided May 5, 1994

Docket Nos. 93-7261(L), -7371, -7409

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT/Filed May 5, 1994
George Lange III, Clerk

ORLANDO CABRERA, LINDA McCOGGLE, JEANNETTE RAMSEY, on behalf of themselves, and all others similarly situated, OPEN HOUSING CENTER, INC.,

Plaintiffs-Appellees, Cross-Appellants,

- v. -

JENO JAKABOVITZ, BENJAMIN BREITMAN,

Defendants-Appellants-Cross-Appellees,

EMANUEL FISCHLER, doing business as AM Realty Co., JAMES SIEGEL, CARL MATOS, also known as Carlos Matos,

Defendants.

Before: NEWMAN, *Chief Judge*, FEINBERG, *Circuit Judge*, and POLLAK,* *District Judge*.

Appeal and cross-appeal from a judgment of the United States District Court for the Eastern District of New York (Arthur Spatt,

---

* The Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Judge), after a jury verdict, awarding damages, injunctive and affirmative relief, and attorney's fees in a suit alleging racial discrimination in the rental of housing.

On the appeal, affirmed except as to attorney's fees, which are remanded for further consideration; on the cross-appeal, affirmed.

Marvin H. Wolf, Dix Hills, N.Y. (Alan F. Katz, Jeffrey M. Garber, Dix Hills, N.Y., on the brief), for *defendant-appellant-cross-appellee Jakabovitz.*

Howard B. Schoenfeld, New York, N.Y. (Hiller & Frank, Milwaukee, Wisc.; Leonard W. Wagman, Snow, Becker & Krauss, New York, N.Y., on the brief), for *defendant-appellant-cross-appellee Breitman.*

Lynn E. Judell, New York, N.Y. (David M. Brodsky, Leslie A. Rubin, Sofia C. Hubscher, Schulte Roth & Zabel, New York, N.Y., on the brief), for *plaintiffs-appellees-cross-appellants*

JON O. NEWMAN, *Chief Judge:*

This appeal presents important issues concerning the framing of jury instructions in all types of discrimination cases. The appeal also presents specific issues concerning the circumstances under which landlords may be found liable for discrimination undertaken either directly by them or by real estate brokers acting as their agents. The issues are on an appeal from a judgment of the District Court for the

Eastern District of New York (Arthur Spatt, Judge) entered after a jury verdict, awarding compensatory and punitive damages in a suit alleging racial discrimination in the rental of housing. We affirm, except for one aspect of the calculation of attorney's fees, as to which we remand for further consideration.

BACKGROUND

In 1987, the Open Housing Center, a not-for-profit organization whose primary purpose is to promote equal opportunity in housing in New York, began an investigation of AM Realty, a real estate brokerage firm in Brooklyn, to see whether it was complying with a prior consent decree not to discriminate in providing housing services. On four occasions from February to July 1987, the Center sent a pair of "testers"[1] of different races to AM Realty's offices to inquire about renting apartments in certain Brooklyn neighborhoods. The two testers in each pair presented a similar rental "profile," each claiming to have a family composition and income similar to the person with whom he or she was paired. In each of the tests, the realty agency directed the White tester in each pair to look at apartments in predominantly White neighborhoods, but directed the African-American or Latino tester to look at apartments in predominantly minority neighborhoods, or, alternatively, informed the minority tester that no apartments were available at all.

With this evidence of "racial steering"[2] by the broker, the Center then turned to examine which landlords employed this particular

---

1 "Testers" are individuals who, without the intent to rent an apartment, pose as renters for the purpose of collecting evidence of unlawful steering away of prospective minority purchasers by real estate agents. *Ragin v. Harry Macklowe Real Estate*, 6 F.3d 898, 904 (2d Cir. 1993).

2 Racial steering is a practice by which real estate brokers and agents preserve and

broker. The Center discovered that Jeno Jakabovitz and Benjamin Breitman were among the landlords who listed their apartments with AM Realty. Jakabovitz owns fourteen buildings in Brooklyn; Breitman owns two. The Center then sent a pair of testers directly to Jakabovitz's offices to inquire about available apartments. Again, the White tester was offered an apartment, while the African-American tester was not.

In the first test, the Open Housing Center sent Orlando Cabrera, a Latino tester, to AM Realty on February 1, 1987. Cabrera asked Am Realty broker Carl Matos for a one-bedroom apartment in Sheepshead Bay or Kings Highway. After making some phone calls, Matos informed Cabrera that no apartments were available. Later that same day, Cindy Reiman, a White tester, arrived and requested a one-bedroom in Sheepshead Bay or Midwood. She spoke with a different broker, James Siegel, who offered her three apartments in Sheepshead Bay, and even drove her to one of the apartments in his car.

In the second test, Ronald Luckett, an African-American tester, inquired on March 6, 1987, at AM Realty about a one-bedroom or studio apartment in Sheepshead Bay or Midwood. Broker Carl Matos offered him an apartment in Flatbush, a predominantly African-American and Latino area. Susan Hamovitch, a White tester, arrived two hours later and met with broker James Siegel. She

---

encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (citation omitted).

asked for a one-bedroom or "junior four" apartment[3] in Sheepshead Bay or Midwood. Siegel offered her a "junior four" in Sheepshead Bay and also a one-bedroom apartment in a building owned by Breitman in Kensington, a neighborhood she had not requested. Hamovitch was also offered a "junior four" apartment in Sheepshead Bay. Breitman says that the apartment in his building to which Hamovitch was referred was later rented to a Latino person.

In the third test, Linda McCoggle, an African-American tester, went to AM Realty on May 2, 1987. Upon entering AM Realty's offices, she was informed by the receptionist that no one was available to see her. The receptionist gave her Carl Matos's business card. McCoggle called AM Realty that same day and spoke with Matos, who told her that no apartment were available, and asked her to call back later in the week. McCoggle did call Matos back, but was again told that there was nothing available. McCoggle called a third time and left a message, but no one returned her call. Rachel Schwartz, a White tester, also arrived at AM Realty's office on May 2, 1987, a short time after McCoggle's visits. He met with Marianne Hascup who told her that both rental agents were out, but gave her Siegel's card and assured her that apartments were available. Siegel called Schwartz a few days later and gave her six apartment listings. He poke with her the next day and added two new apartments. He subsequently called Schwartz two more times to ask whether Schwartz was interested in any of the apartments.

In the fourth test, Augustin Hinkson, an African-American tester, met with Siegel at AM Realty's offices on July 24, 1987. Siegel told Hinkson that there were no apartments available in Sheepshead Bay, Kings Highway, or Midwood. After returning home, Hinkson called AM Realty and left a message for Siegel, who never called back.

---

[3] A "junior four" apartment was described as one having a separate dining room and a bedroom.

Nancy Steifel, a White tester, arrived at AM Realty's offices later that same day. She also requested a one-bedroom in Kings Highway and Sheepshead Bay. Hascup offered her two listings for one-bedroom apartments in those areas.

In the final test, the Open Housing Center sent testers directly to Jakabovitz's offices. Phyllis Spiro, a White tester, went to Jakabovitz's offices on July 29, 1987, and asked for an apartment in Kings Highway or Sheepshead Bay. Jakabovitz told her that there was a one-bedroom apartment available in Kings Highway. Jakabovitz said that the apartment's current tenant had recommended for tenancy a young man who had given Jakabovitz a deposit, but that he "didn't care for that young man," and that if she acted quickly he would rent the apartment to her instead. Jakabovitz also asked Spiro if she was interested in an apartment in Bensonhurst, and she replied that she was not. After Spiro left Jakabovitz's office she went to a location about three blocks away where she had arranged to meet Jeanette Ramsey, an African-American tester. Ramsey then went to Jakabovitz's office and explained that she was looking for an apartment in Kings Highway or Borough Park. Jakabovitz told her that there was nothing available in the areas she requested, but asked if she would be interested in "Cypress." This was apparently a reference to Cypress Hills, a predominantly African-American neighborhood. Ramsey did not indicate any interest in this neighborhood but instead asked Jakabovitz to contact her if anything else became available. Ramsey testified that Jakabovitz never asked her about the size of the apartment she wanted, how much she was willing to pay, or if she was interested in an apartment in Bensonhurst, nor did he call her to follow up.

To recapitulate, the White apartment seekers who followed minority testers Cabrera, McCoggle, and Hinkson were informed of apartments available in buildings owned by Jakabovitz, and the White tester who followed minority tester Luckett was told that there

was an apartment available in a building owned by Breitman. Meanwhile, none of the minority testers was informed of any apartment in any building owned by either Jakabovitz or Breitman. When Jakabovitz was tested directly, he informed White tester Spiro that an apartment was available in the area that she had requested, but told African-American tester Ramsey less than an hour later that no apartment was available in that same area. Jakabovitz admitted at trial that in 1987 he had no African-American tenants in any of the buildings he owned in the predominantly White area at issue.

Based on the results of these tests, the Open Housing Center, along with minority testers Orlando Cabrera, Linda McCoggle, and Jeanette Ramsey, sued Jakabovitz and Breitman, AM Realty, and AM Realty's brokers, for violating Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act" or "Title VIII"), 42 U.S.C. §§ 3601-19; the Civil Rights Act of 1870 ("section 1981"), 42 U.S.C. § 1981, involving the right to enter into a contract; and the Civil Rights Act of 1866 ("section 1982"), 42 U.S.C. § 1982, involving the right to lease real property.

After a two-week trial, the jury rendered a verdict largely in plaintiffs' favor. It found that Matos discriminated against minority testers Cabrera and Luckett in violation of Title VIII, but determined that he did not discriminate against plaintiff McCoggle. The jury found that Siegel discriminated against minority tester Hinkson in violation of Title VIII, and that Jakabovitz discriminated against minority tester Ramsey in violation of Title VIII and sections 1981 and 1982.

The jury's special verdict also decided issues of vicarious liability. The jury found that both Siegel and Matos acted within the scope of their authority and in furtherance of the business of Emanuel Fischler, who was doing business as AM Realty. The jury further found that Fischler acted as the agent of Jakabovitz and Breitman with regard to the events at issue. By these findings, the

jury held the landlords liable for the discriminatory acts of their agent, AM Realty.

The jury awarded only nominal damages to the two prevailing plaintiff-testers, Cabrera and Ramsey, awarded the Open Housing Center compensatory and punitive damages against the brokers and against Jakabovitz, but declined to award even nominal damages against Breitman. The Court directed the jury to deliberate further on the issue of damages against Breitman, but the jury again refused to award even nominal damages against Breitman. Because the jury verdict held Breitman liable for the discriminatory acts of appellants but failed to award even nominal damages, the Court modified the award to provide for nominal damages of one dollar against Breitman. Judgment was entered imposing liability as follows: (a) upon Jakabovitz for $8,000 in compensatory damages and $1,000 in punitive damages in favor of the Open Housing Center, and $1 in nominal damages in favor of Cabrera and Ramsey, (b) upon Breitman for $1 in nominal damages in favor of the Open Housing Center, (c) various sums against the broker-defendants, who have not appealed, (d) injunctive and affirmative relief, and (e) attorney's fees. *See Cabrera v. Fischler*, 814 F. Supp. 269 (E.D.N.Y. 1993). Only the landlords appeal. Plaintiffs' cross-appeal from the Court's reduction in their attorney's fees request and its denial of the costs the Open Housing Center will incur in monitoring the landlords' compliance with the equitable relief ordered by the Court.

DISCUSSION

I. Direct Liability of Jakabovitz

Jakabovitz was held directly liable under Title VIII and sections 1981 and 1982 for refusing to show an available apartment to plaintiff-tester Jeanette Ramsey. Jakabovitz challenges the imposition of direct liability against him on the grounds that (1) the Court erred in its instructions to the jury regarding the burden of

proof, and (2) Ramsey failed to present sufficient evidence to sustain her burden of proving discrimination.

A. Jury instructions on burden of proof

Jakabovitz contends that the District Court erred in instructing the jury regarding (1) the parties' respective burdens in connection with proving discrimination and (2) the possibility of mixed motives on the part of the defendant. Much of the difficulty in this case arises from the fact that language used by appellate courts to formulate burdens of proof and production in the context of bench trials has been imported uncritically into jury charges. Though the burdens of proof and production do not vary from bench to jury trials, the standards that must guide a judge during a bench trial are not necessarily helpful or even appropriate for inclusion in jury charges. The bench trial judge acts both as a determiner of whether a case meets the legal requirements for decision by a fact-finder and as a fact-finder. A jury performs only the latter function. It therefore need not be told about concepts that guide the judge in determining whether the case merits jury consideration. At the same time, it must be told what legal principles to apply depending on the different ways it might view the evidence. Though we have previously pointed out that the jury trial context creates problems that do not arise in bench trials, *see Ostrowski v. Atlantic Mutual Insurance Cos.*, 968 F.2d 171, 186 (2d Cir. 1992), lawyers are still prone to include in requested jury charges language that was written by appellate courts in the context of bench trials—language that is at best irrelevant, and at worst misleading to a jury.[4] Their penchant

---

[4] We have made this point before, *see Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983) ("[P]roposed instructions, couched in such lawyerly cant as '*prima facie* case' and 'shifting burden of proof,' would only have confused the jury."), but it seems not to have been followed. Other courts have provided similar admonitions. *See, e.g., Williams v. Valentec Kisco, Inc.*, 964 F.2d 723,

for doing so has regrettably been abetted by the inclusion of such language in some model instructions.[5]

This case well illustrates the problems that can arise when such language is incorporated in a jury charge. For example, the jury

---

731 (8th Cir.), *cert. denied*, 113 S. Ct. 635 (1992); *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308-09 (10th Cir. 1990); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988); *but see Lynch v. Belden Co.*, 882 F.2d 262, 265-66 (7th Cir. 1989) (approving use of instruction setting out *McDonnell Douglas* analysis, including references to "*prima facie* case"), *cert. denied*, 493 U.S. 1080 (1990).

Recently, the First Circuit, which had earlier led the battle against instructing the jury as to the intricacies of the *McDonnell-Douglas* framework in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), has reconsidered its position and embraced such instructions:

> Although this framework was considered complicated and cumbersome when it was first used in *McDonnell-Douglas*, with repeated use courts have become more comfortable with it, both for their own use in ruling on Title VII claims and for the jury's use in ruling on intentional discrimination. *Loeb v. Textron, supra*. It is a straightforward way of explaining how to consider whether there is intentional discrimination in situations where such discrimination is not likely to be overt.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987). While we agree that courts have become "more comfortable" with the *McDonnell Douglas* framework since the time *Loeb* was decided, we do not see why increased judicial familiarity with the *McDonnell Douglas* standards justifies an explication of these standards, and particularly the legalistic terms in which they are expressed, in instructions to a *jury*.

5 Some jury instruction manuals, however, either omit the burden- shifting language of *McDonnell Douglas and Burdine*, see, e.g., 3 Edward J. Devitt et al., Federal Jury Practice and Instructions: Civil § 104.04, notes (Supp. 1993), or specifically recommend against its inclusion, *see, e.g., Manual of Modern Civil Jury Instructions for the District Courts of the Eighth Circuit* 74 (West 1993) ("It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas*.").

charge included references to "a prima facie case," to the defendants' "burden" of producing evidence of a nondiscriminatory reason for their actions, and to the fact that when a defendant has produced evidence of a nondiscriminatory reason for its actions, "then it is the plaintiffs' burden to persuade you by a preponderance of the evidence that the defendants intentionally discriminated against the plaintiffs because of the plaintiffs' race." Though these statements faithfully endeavored to track the three-step formulation of *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), they created a distinct risk of confusing the jury. "Prima facie case" is not a term readily understood by jurors, and it has at least two meanings for judges. *See id.* at 254 n.7. Moreover, the distinction between burden of persuasion and burden of production is not familiar to jurors, and they may easily be misled by hearing the word "burden" (though referring to a burden of production) used with reference to a defendant in an explanation of that part of the charge that concerns a plaintiff's burden of persuasion. Finally, telling the jury that the burden of persuasion "shifts back" to the plaintiff after the defendant has satisfied its burden of production runs the risk of creating extra confusion.

Basically, none of these phrases needs to be included in a jury charge in a typical case involving a claim of adverse action; based on improper motivation, regardless of the state of the evidence. If the facts of the *prima facie* case are undisputed and the defendant has produced no evidence to rebut the *prima facie* case, no jury charge is needed because the plaintiff is entitled to judgment as a matter of law. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 (1993).[6] If the facts of the *prima facie* case are disputed

---

6 "At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the

and the defendant has produced no rebuttal evidence, then the jury needs to be told that if it finds the following facts, the plaintiffs are entitled to prevail: (1) the plaintiff is a member of the class protected by the statute, (2) the plaintiff sought and was qualified for an apartment (or a job, in an employment discrimination case), (3) the plaintiff was denied the opportunity to rent the apartment (or obtain the job), and (4) the apartment (or job) remained available thereafter. *See id.*[7] However, there is no need to label these four facts as constituting a "*prima facie* case," and it will normally not aid the jury to use that phrase.

If the defendant has met its burden of producing evidence that, if taken as true, would rebut the *prima facie* case, a threshold matter to be decided by the judge, the jury need not be told anything about a defendant's burden of production. In that event, whether or not the facts of the plaintiff's *prima facie* case are disputed, the jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or

---

evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—*i.e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials)." *Hicks*, 113 S. Ct. at 2748 (emphasis in original; citations omitted).

7 "If the defendant has failed to sustain its burden [of production] but reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact *does* remain, which the trier of fact will be called upon to answer." *Id.* at 2748 (emphasis in original). In a footnote to this sentence, the Court continues: "If the finder of fact answers affirmatively — if it finds that the prima facie case *is* supported by a preponderance of the evidence — it *must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff." *Id.* at 2748 n.3 (emphasis in original).

job) was denied because of race (or, in other cases, because of some other legally invalid reason), *see id.* at 2749,[8] and (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation, *see id.*[9] There is no need to inform the jury that the defendant had a burden of production because it is no longer relevant. Id.[10] There is also no need to refer to a burden shifting back to the plaintiff because, if the case requires submission to the jury,[11] all the jury needs to be told about the plaintiff's burden of proof is that the burden of persuasion as to discrimination is on the plaintiff; the presumption that triggered

---

8 "The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race." *Id.* at 2749 (quoting *Burdine*, 450 U.S. at 253).

9 "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" Hicks, 113 S. Ct. I at 2749 (emphasis in original) (footnote and citation omitted).

10 "If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework — with its presumptions and burdens — is no longer relevant. . . . The presumption, having fulfilled its role in forcing the defendant to come forward with some response, simply drops out of the picture." *Id.* at 2749 (citation omitted).

11 A case warrants submission to a jury if the plaintiff's proof is sufficient to create factual issues as to discrimination, whether or not the defendant has discharged its burden of production. If the plaintiff's proof is insufficient to create factual issues as to discrimination, the defendant is entitled to judgment. If the plaintiff's proof is undisputed as to the four factors establishing a *prima facie* case of discrimination and the defendant has failed to discharge it burden of production, the plaintiff is entitled to judgment.

the defendant's burden of production has "drop[ped] out of the picture." *Id.*

What has been said to this point concerns the typical case where the parties dispute whether the adverse action taken by the defendant was motivated by an impermissible factor (such as race or ethnicity) or a permissible factor (such as inability to pay rent or unfitness for employment). In some cases the evidence permits the trier to find that more than one factor motivated the adverse action. In that event, it will be appropriate at the defendant's request, and sometimes at the plaintiff's request, *see Ostrowski*, 968 F.2d at 181, to instruct the jury concerning the defendant's affirmative defense of dual motivation, *i.e.*, that the defendant would have taken the adverse action on the basis of a permissible reason even if the impermissible reason had not existed. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992). In such cases, the jury should be told that the burden of proof remains on the plaintiff to prove that the adverse action was motivated, at least in part, by an impermissible reason, and that, if the jury finds that the plaintiff has sustained this burden, then the defendant can prevail if it sustains its burden of proving its affirmative defense that it would have taken the adverse action on the basis of the permissible reason alone. Of course, if the jury does not find that the plaintiff has sustained its burden, the jury should not go on to consider whether the defendant has sustained its burden concerning the affirmative defense. It might be useful to explain to the jury that the fact-finding as to whether the plaintiff has sustained its burden concerns what actually happened, whereas the fact-finding as to whether the defendant has sustained its burden on the affirmative defense concerns a hypothetical situation.

With these considerations in mind and recognizing that the framework of burdens fashioned in Title VII cases is fully applicable to Title VIII housing discrimination cases, *See Robinson v. 12 Lofts Realty. Inc.*, 610 F.2d 1032, 1036-39 (2d Cir. 1979), we turn to the instructions given in this case. Jakabovitz's first objection is that the Court erred in instructing the jury that he bore the burden of establishing that race played no role in his decision not to show an apartment to the African-American tester. In informing the jury as to the defenses available to a defendant if the plaintiffs established a discriminatory motive, the Court included the following instruction:

> [A] defendant must establish that his decision not to offer an available apartment to plaintiff was based completely on considerations other than race or national origin, that is[,] the defendant must show that race played no role whatsoever in his decision not to afford the plaintiff access to an available apartment.

Jakabovitz timely objected to this instruction, saying, "I respectfully except to the portion of your Honor's charge where it said the defendant has to prove that race played no role." His objection was overruled.

Under *McDonnell Douglas*, the defendant does not bear the burden of establishing that race was not a factor in his or her decision. Instead, the plaintiff always bears the ultimate burden of proving discrimination. While we agree with Jakabovitz that the portion of the charge excerpted above was erroneous, we think that the charge as a whole properly apprised the jury that the plaintiff bore the burden of establishing discrimination. The jury charge repeatedly made clear the plaintiff's burden of proof in the following passages:

> To establish a case under Section 1981, the plaintiffs must establish by a preponderance of the evidence that the defendants were motivated by a racially

discriminatory purpose, that is, the plaintiffs must prove that the defendant intentionally and purposefully discriminated against them because of race.

...

You should also understand that the plaintiffs must prove that the defendants actually were motivated by a racially discriminatory purpose.

....

[Plaintiffs] must establish by a preponderance of the evidence that a defendant intentionally discriminated against them on the basis of race. You should consider the plaintiffs circumstantial evidence along with all of the evidence in the case and determine whether it proves by a preponderance of the evidence that a defendant was motivated by a racially discriminatory purpose.

...

By producing evidence which puts the plaintiffs' claim in question, a defendant has fulfilled his or her burden to offer a non-discriminatory reason for not showing the black plaintiff an apartment in a white area and then it is the plaintiffs' burden to persuade you by a preponderance of the evidence that the defendants intentionally discriminated against the plaintiff because of the plaintiffs' race

...

By meeting this intermediary burden, by offering a non-discriminatory reason or reasons, a defendant has shifted the burden of persuasion back to the plaintiffs.

...

> If you find that the plaintiffs have sustained their burden by a preponderance of the evidence that a defendant purposefully or intentionally discriminated against a plaintiff on the basis of her race, you must then consider the issue of damages.
>
> ...
>
> In order to prove a violation of Section 1982, the plaintiffs must establish by a preponderance of the evidence that the discrimination of which they claim was purposeful and intentional.

Because of the Court's extensive and repeated instructions that the plaintiff bore the burden of proving discrimination, we believe that the jury could not have been led astray by the Court's brief comment to the contrary. When the jury instructions are considered as whole—just as the jury heard them—the placement of the burden of proof onto the shoulders of the plaintiffs become clear. *Ressler v. White*, 968 F.2d 1478, 1479 (2d Cir. 1992).

Jakabovitz also objects to two other jury instructions dealing with proof of discrimination. First, he objects to the Court's instruction that he bore the burden of *proving* that he had a legitimate, nondiscriminatory reason for not showing the apartment to the African-American tester. Jakabovitz, of course, bore only the burden of *producing* evidence in support of his claim of a legitimate, nondiscriminatory reason for his refusal to show the apartment to an African-American person. Jakabovitz points to the following language in the instructions:

> It is the defendants' burden to persuade you on this point, that means a defendant must establish by a preponderance of the evidence that there was a non-discriminatory reason for not offering the apartments to the plaintiff testers.

If this instruction had related to the portion of the jury's consideration that precedes consideration of the defendant's affirmative defense, it would have been erroneous. The sentence is worded in terms of actual intent, rather than the hypothetical state of mind contemplated by *Price Waterhouse*. However, the passage followed immediately after a passage that unmistakably referred to the affirmative defense, as to which the burden quite properly was assigned to the defendant. We do not need to decide whether this passage was erroneous because no objection was made to it, and it could easily have been related solely to the affirmative defense if the Court had been alerted to the possible ambiguity. *See* Fed. R. Civ. P. 51. "The purpose of the Rule is to require the parties to give the trial court an adequate opportunity to cure any error in the instruction before the jury deliberates." *Ostrowski*, 968 F.2d at 177 (citation omitted); see also *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992); *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992).

Second, Jakabovitz protests the Court's inclusion of any instructions concerning the affirmative defense. Again, the point is waived in the absence of objection, and, in any event, a dual motivation instruction would not have been improper on the facts of this case. *See Ostrowski*, 968 F.2d at 181.

B. Sufficiency of the evidence

Jakabovitz' challenge to the sufficiency of the evidence presented by plaintiff Ramsey proceeds from the premise, which we accept, that Jakabovitz discharged his burden of producing evidence to rebut her *prima facie* case. He produced evidence that rebutted Ramsey's showing that the apartment in question was available when she applied to rent an apartment. He asserts that the apartment that he had offered to White tester Spiro was not available an hour later when African-American tester Ramsey arrived because it had been rented to someone else in the meantime. Jakabovitz presented evidence that someone named Andrew Lubrano had come in during

that hour to add $200 to a $50 deposit he had made on the apartment two days earlier. Jakabovitz argues that his presentation of a legitimate, nondiscriminatory reason for his failure to how the apartment placed the burden on plaintiff Ramsey to produce *more* evidence of discrimination. Her failure to present more evidence at that point, Jakabovitz continues, required judgment as a matter of law in his favor.

Jakabovitz offered this argument in a Fed. R. Civ. P. 50(b) motion three weeks after the jury found him directly liable for racial discrimination. The Court denied the motion because it said that Jakabovitz had failed to make the necessary Rule 50(a) motion for judgment as a matter of law at the close of the evidence. On appeal, Jakabovitz contends that the Court ignored a motion that he filed on April 28, 1992, a motion filed, he points out, before the case went to the jury. Jakabovitz fails to note that that motion was made not just before the case went to the jury, but *before trial began*. Rather than deciding whether the trial court should have treated that motion as a timely Rule 50(a) pleading, we prefer to dispose of Jakabovitz's insufficiency claim on the merits.

Jakabovitz misreads the Supreme Court's statement in *Hicks* that once a defendant produces evidence of a legitimate, nondiscriminatory reason for his or her action, the plaintiff must then establish that the defendant's actions were intentionally discriminatory. Jakabovitz takes this statement as requiring the plaintiff to adduce *additional* evidence after the defendant's production—evidence beyond that presented in the plaintiff's *prima facie* case. Justice Scalia took pains to preclude such an interpretation of the Court's decision when he observed that, upon rejection of the defendant's proffered reasons for its action, "no additional proof of discrimination is required." *Hicks*, 113 S.Ct. at 2749 (emphasis in original)(citation omitted). Thus, Ramsey did not fail to offer sufficient evidence of discrimination by not presenting

more evidence after Jakabovitz endeavored to provide a nondiscriminatory reason for his actions.

The jury's verdict holding Jakabovitz liable for discriminating against Ramsey demonstrates that the jury believed that Jakabovitz's explanation was pretextual. The jury may have felt that Jakabovitz's claim that the apartment was no longer available when Ramsey arrived was unbelievable in light of the fact that Lubrano—the person to whom the apartment had supposedly been rented—was never allowed to move in.

II. Vicarious Liability of the Landlords

To hold Breitman and Jakabovitz vicariously liable for AM Realty's discriminatory practices, the Open Housing Center must establish that they employed AM Realty as their agent. See *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985) ("In cases of racial discrimination in housing, a principal is liable for the wrongful acts of its agents."). Judge Spatt submitted the agency question to the jury, which found, in a special verdict, that AM Realty and its brokers acted as agents for both Breitman and Jakabovitz. The landlords contend that the District Court should not have submitted the agency question to the jury. Alternatively they argue that the Court erred in its instructions to the jury regarding the law of agency.

A. The jury finding of agency

The landlords dispute the jury's finding of agency, arguing that AM Realty served not a their agent, but rather as the agent of the prospective tenants. Before we can determine whether AM Realty could be found to be the landlords' agent, we need to determine what standard of review we should apply to this question.

The Open Housing Center urges that the question whether an agency relationship exists is a factual question, a jury's answer to which we review only for clear error. The landlords, on the other hand, maintain that it is a legal question, a trial court's answer to

which we are obliged to review *de novo*. We believe that the question of whether an agency relationship exists is a mixed question of law and fact.[12] We review the District Court's conclusion on the issue only to see whether plaintiffs introduced evidence which, if credited by the jury, would justify a finding of agency.[13] A determination that an agency relationship exists requires the application of a legal standard to a set of historical facts. "Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agents acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Restatement (Second) of Agency § 1 cmt. b (1958). Unless the facts are insufficient to support a finding of agency or there is no dispute as to the historical facts, the question of agency should be submitted to the jury so that it may apply the applicable legal standard, as set forth in the instructions, to the facts,

---

[12] The parties' disagreement over the appropriate standard of review is understandable in light of the confusing array of judicial pronouncements on the issue. *Cf. Sun Bank. N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1036 (11th Cir. 1991) ("The existence of an agency relationship is an issue of fact[.]"); *Metco Products. Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989) ("Generally, the existence and scope of agency relationships are factual matters."); *with Jenkins v. Leonardo*, No. 90-Civ.-3266, 1992 U.S. Dist. LEXIS 10986, *14, 1992 WL 176665, *10, n.5 (S.D.N.Y. July 16, 1992) ("[T]he determination whether these facts give rise to an inference that an agency relationship was created is an issue of law which does not require deference to the conclusion of the trial court."), *aff'd*, 991 F.2d 1033 (2d Cir.), *cert. denied*, 114 S.Ct. 231 (1993).

[13] In order to avoid predicating liability for Title VIII violations on the vagaries of state law, the question whether an agency relationship exists for purposes of the Fair Housing Act is determined under federal law. *See Chicago v. Matchmaker Real Estate Sales Center. Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2961 (1993); *Northside Realty Associates. Inc. v. United States*, 605 F.2d 1348, 1354 n.13 (5th Cir. 1979); *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974).

as the jury finds them.[14] *See Slotkin v. Citizens Casualty Co.*, 614 F.2d 301, 317 (2d Cir. 1979), *cert. denied*, 49 U.. 981 (1980) ("[Plaintiffs'] burden of proof to avoid dismissal of the complaint was not to prove the agency but merely to adduce sufficient evidence to take the issue to the jury.").

We first review the evidence presented by the plaintiffs with regard to the relationship between AM Realty and Jakabovitz. Jakabovitz supplied AM Realty with listings of vacant apartments with the understanding that AM Realty would refer prospective tenants to him for those apartments. Jakabovitz instructed AM Realty to refer only those applicants who met his income requirements (namely, that a tenant's weekly income equalled or exceeded his or her monthly rent) and also his criteria for the number of persons occupying an apartment (roughly, no more than two persons in a studio, and no more than three in a one bedroom apartment). Jakabovitz provided copies of his rental application forms to AM Realty, and AM Realty employees often personally delivered completed application forms to Jakabovitz's office. On those occasions when Jakabovitz was unavailable, leases would be signed in AM Realty's offices, and AM Realty would accept the rent

---

[14] One treatise explains:

> Agency is a question of fact to be determined by the jury or other trier of facts unless no competent evidence legally sufficient to prove it has been introduced or the material facts from which it is to be inferred are undisputed and only one conclusion can be reasonably drawn therefrom. . . .
>
> On the other hand, agency is a question of law for the court where the material facts from which it is to be inferred are not in dispute, the question of agency is not open to doubt, and only one reasonable conclusion can be drawn from the facts in the case.

3 C.J.S. Agency § 547 (1973) (footnotes omitted).

and security deposit on Jakabovitz's behalf. Realty brokers set up appointments for Jakabovitz to meet with prospective applicants, even at times driving applicants to Jakabovitz's office. When Jakabovitz accepted a rental application from a person referred by AM Realty, AM Realty brokers would contact the applicant to tell him or her that the application had been approved.

AM Realty had a larger role in renting Breitman's apartments than it had in renting Jakabovitz's apartments. Breitman too supplied AM Realty with listings of vacant apartments, and expected it to refer only prospective tenants who met his income requirements and his criteria for the number of persons, who would occupy the apartment. But Breitman also required AM Realty to run credit checks on prospective tenants. Furthermore, Breitman asked AM Realty to contact applicants' prior landlords to determine whether the applicants had had any difficulties in paying their rent or in their interactions with other tenants. Like Jakabovitz, Breitman provided AM Realty with rental applications for his apartments. But unlike Jakabovitz, Breitman usually allowed the lease to be signed in AM Realty's offices without being present at the signing. In fact, Breitman often never met with the applicants at any time before they moved in, and instead relied on AM Realty brokers to answer any questions the future tenants might have about the lease.

All of AM Realty's brokers (who are also defendants in this case) admitted in their answers that they acted as the landlords' agents, except for one (Siegel) who neither admitted nor denied that he had acted as the landlords' agent. At trial, however, Fischler, the key figure in AM Realty, denied that he had served as the landlords' agent, explaining his earlier concession as the handiwork of his former attorney. Breitman himself admitted in a number of pretrial pleadings that AM Realty served as his agent, but also disavowed that admission at trial. While trial testimony that controverts an admission contained in a pleading may reduce the weight given to that admission, *see United States v. McKeon*, 738 F.2d 26, 31 (2d

Cir. 1984), the jury is free to disregard the later retraction if it finds the retraction not credible. A person's statement that he was an agent of another may not establish that relationship as an incontrovertible fact, but it can help establish that that individual himself believed that he was acting on another's behalf and under another's control. *See Slotkin*, 614 F.2d at 316 ("'[A] person can properly testify as to the facts which it is alleged constitute his authority, and his testimony can be introduced either by or against the alleged principal.'" (citation omitted)); Restatement (Second) of Agency § 285 cmt. a (1958). Likewise Breitman's admission in the pleadings that AM Realty was his agent may help establish that he had agreed that AM Realty would act as his agent.

As mentioned earlier, whether an agency relationship exists "depends on the existence of required factual elements: the manifestation by the principal that the agent hall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. *Id.* § 1 cmt. b. Here, there was ample evidence from which the jury could have inferred that the landlords had manifested desire to have AM Realty act on their behalf in renting their apartments, and that AM Realty had accepted this agency. The landlords provided AM Realty with listings of their apartments and their criteria for acceptable tenants. AM Realty engaged in the business of renting these apartments and in "screening" the applicants to make sure that they met Breitman's and Jakabovitz's specifications There was sufficient evidence also to indicate that the landlords controlled AM Realty's activities in referring candidates for these apartments. Both landlords had the power to deny further listings to AM Realty if the brokerage referred unacceptable applicants for the apartment. Breitman had in fact at one point cut off AM Realty from receiving further listings from his apartments, but had later reinstated the brokerage.

Appellants urge that the Supreme Court's decision in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), requires us to reverse the finding of agency. In *General Building*, the Court held that *respondeat superior* was not available where plaintiffs had presented no evidence that certain trade associations and construction employers controlled a union and training committee. Here, however, as we have seen, plaintiffs presented evidence that the landlords dictated the qualifications for prospective tenants, and conditioned the realtor's receipt of future apartment listings on its abiding by-the landlords' specifications These facts also distinguish this case from *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 447 F.Supp. 838 (E.D.N.Y. 1978), a case in which the District Court ruled that no agency relationship existed between brokers and a real estate multiple listing service. The Court held that a service that provided property listings to brokers was not responsible for the brokers' racial steering because the brokers did not "act on behalf, at the behest, or for the benefit" of the listing service, and because the service did not control the sales of the brokers, but only conditioned its provision of listings to the brokers. *Id.* at 842. Unlike *Wheatley Heights*, the brokers in the instant case acted pursuant to the landlords' directives to refer only acceptable tenants and the landlords benefitted from the broker' service by renting their vacant apartments. Furthermore, the landlords not only conditioned the receipt of future apartment listings, but also required the brokers to perform various services, including screening applicants according to the landlords' rental criteria, showing them available apartments, and shepherding them through the application process. Plaintiffs presented sufficient evidence regarding the existence of an agency relationship to take the issue to the jury.

The landlords further argue that the brokers could not have been their agents because the brokers earned their commissions from prospective tenants, not from the landlords. The fact that the tenants paid the broker does not preclude a finding that the broker acted as

the owner's agent in renting the apartment.[15] The District Court presented the question of agency to the jury, which found that the evidence demonstrated that AM Realty had served as the landlords' agent. We cannot say that the evidence was insufficient as a matter of law to allow this conclusion.

Finally, the landlords contend that imputing liability to a landlord for the discriminatory practices of a real estate broker contravenes what they believe to be a public policy favoring the use of real estate brokers. We believe that our decision will not harm the business of renting apartments, whether or not brokers are used. First, public policy certainly does not favor the use of brokers who engage in the repugnant practice of racial steering. Our decision will only increase the costs of using brokers who discriminate, and thereby potentially reduce such discrimination. Second, landlords need not be dissuaded from using brokers because of their fear that they will be held liable if the brokers discriminate. Landlords will be able to allay this concern by looking over the racial composition of the broker's referrals for any sign of discrimination. While this examination will not prove that a broker is discriminating, it will at least alert the

---

[15] This point was made in an unreported decision rendered some years ago by Judge Conner:

> The Court rejects the suggestion that because Kahan [the broker] is paid and technically employed by prospective tenants, the owners could not be found to "control" Kahan, and are therefore immune from liability. While this fact may make it more difficult for plaintiffs to prove that Kahan acted as the owners' agent, the Court cannot say at this stage that plaintiff could prove no set of facts that would support such a claim. For example, plaintiffs may be able to establish that Kahan acted as alleged at the owners' request in order to obtain listings. It also appears that rentals arranged by Kahan were subject to the owners' approval.

Ragin v. Kahan & Kahan Realty, Ltd., No. 79-Civ.-484 (S.D.N.Y. Aug 7, 1979).

landlord to that possibility and allow the landlord to take appropriate steps to avert such discrimination. Finally, instead of frustrating pubic policy goals, we believe that our decision will actually further the purpose of the Fair Housing Act:

> The provisions of 42 U.S.C. § 3604 are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially segregated housing with "truly integrated and balanced living patterns."

Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982) (quoting *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 21 (1972) (quoting statement of Senator Walter Mondale, 114 Cong. Rec. 3422)).[16]

B. Jury Instruction on agency

Even if submitting the question of agency to the jury was not error, there my have been error in the jury finding of agency if the court improperly instructed the jury as to the law of agency. Jakabovitz contends that Judge Spatt erred by declining to give an instruction the landlord had requested as to scope of authority. Jakabovitz joined Breitman in excepting to Judge Spatt's refusal to give the following instruction which Breitman had requested:

> [I]f you find that AM Realty was the agent of Mr. Breitman, but you find that he did not authorize AM Realty to engage in any wrongful act in which AM

---

[16] Because we decide that the landlords are liable for AM Realty's discrimination under traditional doctrines of *respondeat superior*, we do not need to consider whether they might also be liable because landlords may have a nondelegable duty not to discriminate. *See General Building*, 458 U.S. at 395-96 (defining non-delegable duty); *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir 1992) (holding that property owner's duty not to discriminate in leasing or sale of property is nondelegable).

> Realty may have engaged, then you also must find for Mr. Breitman.

Judge Spatt properly declined to give this instruction because it misstated the law. Breitman and Jakabovitz did not have to authorize AM Realty specifically to discriminate in order to be liable for that discrimination. *See Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992) (holding real estate brokerage firm liable for racial steering of its agent even though firm had explicitly instructed agents not to discriminate), *cert. denied*, 113 S.Ct. 2961 (1993); *Northside Realty*, 605 F.2d at 1354 (holding that president and vice-president of brokerage could be held liable for discriminatory acts of their agents, "whether or not [they] directed or authorized the particular discriminatory acts that occurred"). "A principal is often subject to liability for the unauthorized conduct of an agent with respect to matters which, under the agreement creating the relation, he has a right to direct." Restatement (Second) of Agency § 216 cmt. a (1958). Here, it was beyond dispute that the landlords had a right to control the criteria used by the brokers in selecting which prospective tenants would be shown Jakabovitz's and Breitman's apartments. One commentator has explained that the law imposes liability in such cases because "[i]t would be too easy for the broker or owner to plead ignorance when an agent was caught and it would be unfair to only punish a manager or agent for what the owner or employer should have controlled and trained the employee to avoid." James A. Kushner, Fair Housing § 4.22 at 255 (1983). The agency instructions were not erroneous.

III. Breitman's Individual Challenges to Vicarious Liability

In addition to the challenges of both landlords to vicarious liability, Breitman also seeks to vacate the judgment against him, but on grounds pertinent only to his vicarious liability. First, Breitman challenges the basic case against him, arguing that the plaintiffs failed to make out a prima *facie case* of discrimination. He

also suggests that the jury actually exonerated him by refusing to award any damages against him, and alternatively, that the jury verdict was ambiguous as to his liability.

A. Prima facie case

Plaintiffs presented the following evidence in support of their *prima facie* case of discrimination by Breitman. Ronald Luckett, an African-American tester, testified that on March 6, 1987, he went to the office of AM Realty at 10 a.m. and spoke with salesperson Carl Matos. Luckett requested a one-bedroom apartment in Midwood or Sheepshead Bay, but said that he might settle for a studio. Matos told Luckett that he had arrived too late, and that new apartment listings came in on Monday morning or Friday afternoon. However, Matos mentioned that he had a few apartments available in another area—on Argyle Road in Flatbush. Plaintiffs' expert Professor Emanuel Tobier testified later that these apartments were in a predominantly African-American and Latino neighborhood. After seeing the apartments on Argyle Road, Luckett called Matos and was again told that there were no apartments available in the areas he had requested.

Susan Hamovitch, a White tester, testified that she arrived at AM Realty's offices at noon on the same day. She met with James Siegel, another salesperson at AM Realty.[17] She informed him that she was looking for a one-bedroom or "junior four" apartment in Midwood or Sheepshead Bay. Siegel instead suggested she view an apartment in Kensington, a neighborhood which she considered comparable to Midwood. Siegel then drove with Hamovitch in her car to look at the Kensington apartment, which was owned by Breitman. After she

---

[17] It is undisputed that both Matos and Siegel had access to the same apartment listings, contained in a central listing book. According to Fischler, this book was stolen from AM Realty's offices about two weeks after the filing of the complaint in this case.

looked at this apartment, she looked at a "junior four" apartment that Siegel said was available in Sheepshead Bay. Siegel did not accompany her to see this second apartment. Siegel called her the following day to inquire about her opinion of the two apartments. He called again later in the week to report that the apartment in Kensington had been rented, and to ask whether she might be interested in viewing other apartments.

Breitman argues that these facts did not suffice to establish a *prima facie* case of discrimination because the African-American tester "did not apply to rent Breitman's property, nor was he rejected as a tenant." Brief of Appellant Breitman at 40. Breitman maintains that he cannot be faulted for the realty agent's failure to offer Breitman's apartment in Kensington because the tester never asked for an apartment in Kensington. Since the tester never asked, Breitman continues, there was nothing wrong with not showing him the apartment.

The problem with this argument is that it ignores the fact that the realtor offered to show Breitman's one-bedroom apartment in the Kensington to the *White tester* even though she also had never asked for an apartment in that area. Enforcement of the Fair Housing Act is not to be frustrated because cunning landlords can take advantage of a large array of devices to hide their discrimination. "Rental housing discrimination is pervasive in large part because it is so easily disguised by rules and subtle practices or tactics of landlords and building managers." James A. Kushner, Fair Housing § 3.16 at 97 (1983). One of these devices is to offer to show apartments in predominantly White neighborhoods to prospective renters who are White, even if these renters do not express any interest in those neighborhood. By so doing, the landlord can increase the chances of renting those apartments to White tenants. Breitman's crabbed reading of the statute would effectively immunize this mechanism for racial steering from judicial scrutiny.

Breitman's analysis does not comport with the Fair Housing Act's "broad legislative plan to eliminate all traces of discrimination within the housing field," *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974). As long as a plaintiff can prove that a defendant afforded an African-American person fewer housing opportunities than a similarly-situated White person on account of race, the plaintiff has made out a case under Title VIII. *See Matchmaker Real Estate*, 982 F.2d at 1096 (holding realtor liable in part because its agents "denied the black testers information about housing that they readily gave to similarly situated white testers"); T. Alexander Aleinikoff, Note, "Racial Steering: The Real Estate Broker and Title VIII," 85 Yale L.J. 808, 820 (1976) (Title VIII should prevent "the broker, at his own option, from selecting housing on the basis of race to show the customer.").

Breitman worries that if we uphold the District Court's decision against him, we will impose on landlords and realtors the nearly impossible duty of informing every prospective tenant about all available apartments, even ones in neighborhoods about which the tenant did not inquire. This fear is unwarranted. Landlords and their agents will not have to tell tenants about all apartments everywhere. They will only have to make sure that they do not provide less information to one person than to another simply on account of race.

B. Other challenges to the verdict

Breitman also makes the somewhat remarkable claim that he should not now be before this Court because the jury actually absolved him from any liability for discrimination. Breitman finds vindication in the fact that the jury refused to award even nominal damages against him. He points out that even though the jury assessed compensatory and punitive damages against AM Realty brokers and against Jakabovitz, it declined to assess any damages against Breitman. Judge Spatt, observing that the jury verdict held Breitman liable for AM Realty's acts of discrimination but failed to award even nominal damages against him, asked the jury to

reconsider its decision not to award even nominal damages against Breitman. When the jury reaffirmed its earlier decision, the plaintiffs moved to modify the verdict to award nominal damages against Breitman, and the Court granted that motion. *See Cabrera*, 814 F.Supp. at 277.

We believe that the jury's refusal to award damages against Breitman showed only that they believed that he was less culpable than the other defendants. The jury did, however, believe he was guilty of discrimination, as is evident from its affirmative responses to the following three questions:

> 1. Did the plaintiffs establish that the defendants JAMES SIEGEL and CARLOS MATOS acted within the scope of their authority and in furtherance of the business of the defendant EMANUEL FISCHLER, doing business as AM REALTY CO.?
>
> YES XXX NO ___
>
> 3. Did the plaintiffs establish that the defendant EMANUEL FISCHLER, doing business as AM REALTY CO.[,] acted as an "agent" for the defendant BENJAMIN BREITMAN, as the Court has explained that concept to you, with regard to the incident of March 6, 1987 involving the testers RONALD LUCKETT and SUSAN HAMOVITCH?
>
> YES XXX NO ___
>
> 5. Do you find that the plaintiff OPEN HOUSING CENTER, INC. established, that on March 6, 1987, RONALD LUCKETT was discriminated against by the defendant CARLOS MATOS because of his race, in violation of Title VIII, the Fair Housing Act?
>
> YES XXX NO ___

These answers clearly show that (1) AM Realty acted as Breitman's agent with regard to the test conducted by Ronald Luckett and Susan Hamovitch; (2) Matos acted within the scope of his authority at AM Realty; and (3) Matos discriminated against Luckett on March 6, 1987, in violation of the Fair Housing Act. By these findings, the jury held Breitman responsible for the discrimination Luckett suffered when he sought housing at AM Realty. Moreover, it is not unheard of for juries to find a violation of a right yet decline to award any damages. *Fassett v. Haeckel*, 936 F.2d 118, 121 (2d Cir. 1991); *Ruggiero v. Krzeminski*, 928 F.2d 558, 563-64 (2d Cir. 1991). We have said that in such a case, instead of throwing out the verdict of liability against the defendant, the trial court can direct the jury to enter an award of nominal damages. *See Ruggiero*, 928 F.2d at 564; *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984).

Breitman also contends that this verdict was ambiguous because the jury might have been thinking not about his apartment in Kensington that White tester Susan Hamovitch saw on March 6, 1987, but rather the other apartment (not owned by Breitman) that she saw on that day. Even putting aside the dubious factual basis of this objection, we hold that it was waived because Breitman failed to take up the District Court's offer to modify the verdict sheet on this score before it went to the jury. *See Cabrera*, 814 F.Supp. at 279. We see no plain error resulting in a miscarriage of justice that would allow us to ignore Breitman's waiver of the issue.

Finally, Breitman contends that there were nondiscriminatory reasons for the brokers' failure to show his apartment to the African-American tester even though they showed it to the White tester. Breitman presented these reasons at trial but the jury rejected them. We see no clear error in that decision.

IV. Attorney's Fees

The District Court awarded plaintiffs attorney's fees and costs against defendants in the amount of $335,280.20. In awarding

attorneys fees and cost, the Court relied on two statutes, 42 U.S.C. § 1988(b) and 42 U.S.C. § 3613(c)(2), the former ("The Civil Rights Attorney's Fees Act of 1976") providing for attorney's fees in sections 1981 and 1982 civil rights cases, and the latter (part of Title VIII) providing for attorney's fees in Fair Housing Act cases. As for the defendants (including Jakabovitz) who were found liable under section 1981 and 1982, as well as Title VIII, the Court granted attorney's fees under 42 U.S.C. § 1988(b). However, as for Breitman, who was charged and found liable only for violating Title VIII, the Court granted attorney's fees under 42 U.S.C. § 3613.

A. Retroactive application of attorney's fee amendment

Until early 1989, a court could award attorney's fees and costs to a prevailing plaintiff in a Fair Housing Act action only if the plaintiff was "not financially able to assume said attorney's fees." 42 U.S.C. § 3612(c) (1982). In 1988, Congress eliminated the financial need requirement and opted instead to leave the granting of attorney's fees and costs to the discretion of the trial court. 42 U.S.C. § 3613(c)(2) (1988). This amendment became effective on March 18, 1989, about a year-and-a-half after the instant case had begun. Breitman contends that the Court improperly applied this amendment retroactively to this case by not requiring the plaintiffs to establish financial need before awarding them attorney's fees and costs.[18] [*Ed. Note:* text omission/error in original] but rejected it on

---

[18] Jakabovitz does not join in Breitman's contention because the Court assessed attorney's fees against him on the basis of his sections 1981 and 1982 violations, rather than his Title VIII violations. Plaintiffs prevailing under both 42 U.S.C. § 1982 and the Fair Housing Act are "entitled to benefit from the more liberal provisions of 42 U.S.C. § 1988, which allow recovery of attorneys' fees without consideration of plaintiffs' financial circumstances, as is required by 42 U.S.C. § 3612(c)." *Woods-Drake v. Lundy*, 667 F.2d 1198, 1204 (5th Cir. 1982) (citations omitted). *See also Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983); *Price v. Pelka*, 690 F.2d 98, 100 (6th Cir. 1982). Breitman, however, was

the ground that retroactive application was justified. After the District Court decision in the instant case, however, we ruled in *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 910-11 (2d Cir. 1993), that the attorney's fee amendment in 42 U.S.C. § 3613(c)(2) should not be applied retroactively.[19] We held that the amendment applied only to legal services rendered on or after the amendment's effective date. Thus, in the instant case, the District Court could have awarded attorney's fees and cost for legal services rendered prior to the effective date only upon a showing of financial need, but could have awarded fees and costs for services rendered on or after the effective date without such a showing. Indeed, plaintiffs admit as much in a letter to the Court. *See* Plaintiffs' Letter of October 8, 1993.

Not ready to concede that a remand is required in light of *Ragin*, however, plaintiffs argue that they have already met the requirements of the earlier version of the statute. They contend that no remand is necessary because the District Court has already found that they are unable to pay attorney's fees. They point to the following language in the District Court opinion as demonstrating that finding:

> [A hearing on the plaintiffs' financial status] would require the parties to incur additional expenses and may be an unnecessary expenditure of judicial resources for the following reasons: (1) a substantial part of the plaintiffs' attorney's fees would not be

---

not charged with violating sections 1981 and 1982, and the Court accordingly had to rely on the Fair Housing Act's attorney's fee provision in granting its award.

[19] We have reviewed our *Ragin* holding in light of the Supreme Court's recent decisions in *Landaraf v. USI Film Products*, 62 U.S.L.W. 4255 (April 26, 1994), and *Rivers v. Roadway Express*, 62 U.S.L.W. 4271 (April 26, 1994), and we find no reason to think that the result in *Ragin* was incorrect.

> affected by the hearing's outcome, as they were incurred after the effective date of the amendments (2) as the Open Housing Center is a not-for-profit organization, there is a reasonable likelihood that it is financially unable to meet the legal costs it incurred in this case; and (3) the defendants have stated that in order to prepare for such a hearing, they will require further discovery.

Cabrera, 814 F.Supp. at 286-87. However, the Court's educated guess that it is reasonably likely that a plaintiff can meet 42 U.S.C. § 3612(c)'s old requirement of financial need does not substitute for a finding on that issue. Indeed, the Court's remarks suggest the opposite of what the plaintiffs believe they say. Instead of showing that the Court found the plaintiffs to be financially unable to pay attorney's fees, the quoted remarks show only that the Court decided not to undertake the burden of examining the plaintiffs' financial means because it was under the mistaken impression that such an inquiry was unnecessary.

We accordingly vacate the grant of attorney's fees against Breitman and remand for further proceedings not inconsistent with this opinion. Our order affects only that twenty percent of the total attorney's fees and costs award that is taxed to Breitman. *See Cabrera*, 814 F.Supp. at 292.

B. The basis for awarding attorney's fees against Breitman

Breitman also makes a more fundamental attack against the award of attorney's fees against him. He argues that the legal and equitable relief directed against him was too insignificant to justify the Court's award of attorney's fees against him. Citing *Farrar v. Hobby*, 113 S.Ct. 566 (1992), Breitman contends that the one dollar nominal fee award, coupled with equitable relief that was "minimal compared to that awarded against Jakabovitz . . . [or to that]

requested by Appellees," was insufficient to support the award against him.

We disagree. In *Farrar*, the Supreme Court said that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award." *Farrar*, 113 S.Ct. at 574 (quoting *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 (1989)). Assuming for the argument that *Farrar's* standard, though articulated in a 42 U.S.C. § 1988 attorney's fees case, applies in a Title VIII attorney's fees case, we hold that plaintiffs easily met that standard. The fact that plaintiffs obtained only one dollar in damages from Breitman does not automatically exempt him from paying any share of plaintiffs' attorney's fees. *See id.* at 578 (O'Connor, concurring) ("[A]n award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved."). Here, the plaintiffs prevailed on a significant legal issue—namely, that landlords can be held liable for employing real estate brokers who are engaged in racial steering. One does not search "in vain for the public purpose" this litigation has served. *Id.* That purpose is readily apparent: Breitman's loss in this case serves as a clear warning to landlords that the law will not tolerate their use of brokers who discriminate invidiously.

V. Cross-appeal

Plaintiff's cross-appeal from the District Court's reductions in their attorney's fees request. After considering the prevailing marketplace rates for the type of work performed and the experience of the attorneys, Judge Spatt decided to award partners in the case no more than $200 per hour, and associates no more than $135 per hour. *See Cabrera*, 814 F.Supp. at 288. We believe that Judge Spatt's choice of rates was well within his discretion .

Plaintiffs also cross-appeal from the Court's denial of the costs the Open Housing Center will incur in monitoring the landlords' compliance with the equitable relief ordered by the Court. Plaintiffs

point out that the equitable relief ordered by the Court requires their active participation in integrating Jakabovitz's apartment buildings.[20] While we agree with the plaintiffs that the Court had the discretion to award such costs, *see Matchmaker Real Estate*, 982 F.2d at 1099, we do not believe that it exceeded that discretion by denying those costs here.

CONCLUSION

We affirm all aspects of the judgment except the determination of the amount of attorney's fees awarded against Breitman, and remand for further consideration of that one issue.

---

[20] A brief description of the relief ordered may be useful to show the Open Housing Center's role in that relief. In order to counter the effects of past discrimination, the District Court ordered Jakabovitz to take affirmative steps for a period of two years to attract minority tenants to his buildings. *See Cabrera*, 814 F.Supp. at 284. The District Court ordered that during these two years, Jakabovitz would have to inform the Open Housing Center of every fourth apartment that became vacant in one of seven buildings he owns in Brooklyn. The Center would then have a week, during which time it could refer "qualified minority apartment seekers" to Jakabovitz to fill the vacancy. *Id.* During that week, Jakabovitz for his part would be able to show the vacant apartment only to those persons referred by the Center. Furthermore, Jakabovitz also would not be allowed to advertise that apartment as being available. If Jakabovitz decided to reject a prospective tenant referred by the Center, he would have to inform the Center and the applicant why he did so. If after this week, the apartment had not been rented to an applicant referred by the Center, Jakabovitz would then be free to rent it to someone not referred by the Open Housing Center (as long as he did so according to the requirements of the Fair Housing Act).

APPENDIX B

ORLANDO CABRERA, LINDA McCOGGLE and JEANETTE RAMSEY, on behalf of themselves and all others similarly situated, and the OPEN HOUSING CENTER, INC.,

Plaintiffs,

v.

EMANUAL FISCHLER, d/b/a AM REALTY CO., JAMES SIEGEL, CARL MATOS, a/k/a CARLOS MATOS, JENO JAKABOVITZ, and BENJAMIN BREITMAN,

Defendants.

CABRERA v. FISCHLER

CV 87-2675 (ADS)

United States District Court for the Eastern District of New York

814 F. Supp. 269; 1993 U.S. Dist. LEXIS 1924

February 17, 1993, Decided

COUNSEL: [**1] SCHULTE ROTH & ZABEL, ESQS., Attorneys for Plaintiffs, 900 Third Avenue, New York, NY 10022, By: David Brodsky, Esq., Lynn E. Judell, Esq., Of Counsel.

SNOW BECKER KRAUSS, P.C., ESQS., Attorneys for Defendant Breitman, 605 Third Avenue, 25th Floor, New York, NY 10158, By: Leonard W. Wagman, Esq., Of Counsel. MARVIN H. WOLF, ESQ., Attorney for Defendant Jakabovitz, 3 Executive Court, Dix Hills, NY 11746. EMANUAL FISCHLER, Defendant Pro Se, 1200 Neck Road, Brooklyn, NY 11229. CARLOS MATOS, Defendant Pro Se, 463 Avenue P, Brooklyn, NY 11230. JAMES SIEGEL, Defendant Pro Se, 1717 Avenue N, Brooklyn, NY 11230.

Ed. Note: "*" indicates citation to F.Supp; "**" indicates citation to the LEXIS version of the opinion.

JUDGES: SPATT

OPINION BY: ARTHUR D. SPATT

OPINION: [*271] MEMORANDUM DECISION AND ORDER

SPATT, District Judge.

In this class action, a jury determined that the defendants, who are landlords and real estate brokers, discriminated against two of the three individual black and hispanic plaintiffs and two other black individuals who had inquired about renting apartments in Brooklyn. The jury awarded the successful individual plaintiffs nominal damages and the plaintiff Open Housing Center compensatory and punitive damages against each defendant except the defendant-landlord Benjamin Breitman, against whom [**2] the jury declined to award even nominal damages.

Before the Court at this time are the following motions: (1) the plaintiff Open Housing Center, Inc. moves for an award of nominal damages against Breitman; (2) all successful plaintiffs seek equitable relief and an award of attorney's fees against all of the defendants, (3) the defendant-landlord Benjamin Breitman moves for "judgment on the verdict", and (4) the defendant-landlord Jeno Jakabovitz moves to set aside the verdict against him in favor of the plaintiff Jeanette Ramsey.

[*272] BACKGROUND

Defendants Jeno Jakabovitz ("Jakabovitz") and Benjamin Breitman ("Breitman") each own apartment buildings in Brooklyn — Jakabovitz owns fourteen buildings, Breitman owns two. In attempting to rent the few vacancies which arose in their buildings during the times relevant to this action, Jakabovitz and Breitman employed the services of AM Realty Co. ("AM Realty"), a real estate agency owned and operated by the defendant Emanual Fischler ("Fischler"). Defendants James Siegel ("Siegel") and Carl

(Carlos) Matos ("Matos") were two of AM Realty's salespersons during this period.

The plaintiffs alleged that Jakabovitz and Breitman, through [**3] the acts of their agent, AM Realty, discriminated against Orlando Cabrera ("Cabrera"), a hispanic male, and Linda McCoggle ("McCoggle"), a black female, both named individual plaintiffs, and Ronald Luckett ("Luckett"), a black male, and Augustin Hinkson ("Hinkson"), a black male, on the basis of race, by refusing to show apartments in their respective buildings to these individuals.

At the trial, the plaintiffs offered proof that Cabrera, McCoggle, Luckett and Hinkson, individually and on separate occasions, went to AM Realty seeking apartments in the Brooklyn communities of Midwood, Sheepshead Bay and Kings Highway. Cabrera, McCoggle and Luckett each met with Matos; Hinkson met with Siegel. They were each told by the salesperson with whom they spoke that, in effect, no apartments matching their request were immediately available. Instead, these individuals were "steered" to available apartments in areas of Brooklyn with a greater minority population and were, in most cases, offered the opportunity to inspect these apartments.

The plaintiffs further offered proof that shortly after the black or hispanic apartment seeker left AM Realty, a white apartment seeker entered the [**4] agency and inquired about housing similar to that requested by the black or hispanic apartment seeker who preceded him or her. The proof revealed that these white apartment seekers were each told that apartments of the type and location sought by both the white and minority apartment seekers were available. Specifically, the white apartment seekers who followed Cabrera, McCoggle and Hinkson were informed of apartments available in buildings owned by Jakabovitz, while the white apartment seeker who followed Luckett was informed of the availability of an apartment in one of Breitman's buildings.

Additionally, plaintiff Jeanette Ramsey ("Ramsey"), a black female, alleged that Jakabovitz personally discriminated against her, similarly on the basis of her race. Ramsey and a white apartment seeker did not meet with anyone from AM Realty but rather dealt with Jakabovitz personally.

In sum, the plaintiffs contended at the trial that the defendants' disparate treatment of the black or hispanic apartment seekers, as compared to the treatment accorded the white apartment seekers, constituted discrimination in violation of applicable law.

The above-described activities were the product of [**5] "tests" conducted by the plaintiff Open Housing Center. Judge Haight of the Southern District of New York recently described the Open Housing Center as

> "a not-for-profit New York corporation whose primary purpose is to promote equal opportunity in housing in the New York metropolitan area. It seeks to eliminate unlawful racially discriminatory housing practices in respect of the rental or purchase of apartment units in the metropolitan area, and to assure all persons seeking to rent or buy apartment units the housing of their choice, free of discrimination. In aid of these goals, the OHC assists individuals in obtaining equal access to housing; prepares and distributes information on housing in all five boroughs of New York City; investigates allegations of discrimination and refers complaints to appropriate public agencies or private attorneys; provides counseling and referral services to members of the public who seek housing opportunities; and educates members of the public about housing issues and their legal rights." (*Open Housing Ctr., Inc. v. Samson Management Corp.*, No. 91-5111, 1992 U.S. Dist.

LEXIS 15729 [*273] [S.D.N.Y. October 14, 1992].
[**6] *See also* Amended Complaint, P 8.)

In conducting its "tests" in this case, the Open Housing Center sent a black or hispanic person to either AM Realty or Jakabovitz to inquire about available apartments in the Midwood, Sheepshead Bay and Kings Highway communities. After the black or hispanic person's visit, a white person visited the same party and asked about the availability of similar housing.

These pairs of people are commonly called "testers". They have no actual intention of renting an apartment, but pose as renters for the purpose of collecting evidence of unlawful discriminatory practices. Other than race, the tester pairs sent by the Open Housing Center purported to possess substantially similar distinguishing characteristics and personal backgrounds. The plaintiffs argued that the differences in the way the white testers and the black and hispanic testers were treated indicated discrimination.

This two-week trial resulted in a jury verdict on May 13, 1992. The jury found that salesperson Matos discriminated against Cabrera and Luckett In violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq., but determined that Matos [**7] did not discriminate against plaintiff McCoggle. Additionally, the jury found that salesperson Siegel discriminated against Hinkson, in violation of the Fair Housing Act, and that Jakabovitz discriminated against Ramsey in violation of the Fair Housing Act, the Civil Rights Act of 1870, 42 U.S.C. § 1981, involving the right to enter into a contract, and the Civil Rights Act of 1866, 42 U.S.C. § 1982, involving the right to lease real property.

Preliminarily, the jury determined that both Siegel and Matos acted within the scope of their authority and in furtherance of the business of Fischler, doing business as AM Realty. The jury further found that Fischler, doing business as AM Realty, acted as the agent of the landlord-defendants Jakabovitz and Breitman with regard to

the events at issue in this case. By these findings, the jury held the landlord-defendants liable for the discriminatory acts of their agent, AM Realty.

Having so determined, the jury declined to award compensatory damages to either Cabrera or Ramsey, the testers. Instead, the jury awarded them each nominal damages in the sum of one dollar. [**8] The jury awarded the Open Housing Center compensatory damages against Siegel in the sum of $ 1,000, against Matos in the sum of $ 3,000, and against Jakabovitz in the sum of $ 8,000. In addition, the jury declined to award punitive damages in favor of Cabrera or Ramsey against any of the defendants, but awarded such damages to the Open Housing Center in the sums of $ 1,000 against Fischler, $ 350 against Siegel, $ 1,000 against Matos, and $ 1,000 against Jakabovitz. The jury declined to award any compensatory, nominal or punitive damages against Breitman.

When the jury determined that AM Realty acted as Breitman's agent and that Matos discriminated against Luckett, yet declined to award even nominal damages against Breitman, the Court directed the jury to further deliberate on the issue of damages against Breitman. The jury quickly returned and confirmed its original decision, declining to award any damages against Breitman.

Numerous other parties were originally named as party defendants. However, the plaintiffs and these other defendants entered into consent decrees, approved by Judge Korman of this Court, leaving only Fischler d/b/a AM Realty, Matos, Siegel, Breitman, Jakabovitz, [**9] and Marianne Hascup ("Hascup"), another of AM Realty's brokers, as the remaining defendants. At the trial, this action was dismissed as against Hascup. Additionally, Ronald Luckett was originally named as a plaintiff in this action but withdrew before the trial.

Although real estate agencies have been held liable for the discriminatory acts of the brokers they employ (*see, e.g., City of*

Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 [7th Cir. 1992] [available on Lexis at 1992 U.S. App. LEXIS 323431), and landlords have been held liable for the discriminatory acts of their managing agents, who are employees of the landlords, (*see, e.g., Walker v. Crigler*, 976 F.2d 900 [4th Cir. 1992]), this case may be the first in which a jury has held a landlord liable for the discriminatory [*274] acts of independent real estate agents acting on behalf of the landlord. Mindful of the significance and apparent novelty of this case, the Court now turns to the parties' respective motions.

THE INSTANT MOTIONS

Plaintiffs' Motions

The plaintiff Open Housing Center moves for an award of [**10] nominal damages against Breitman. All of the successful plaintiffs seek equitable relief and an award of attorney's fees against all defendants.

In their motion for equitable relief, the plaintiffs seek declaratory, prohibitive and affirmative relief. Specifically, with regard to all of the defendants, the plaintiffs request (1) a declaration that the defendants' acts violated the Civil Rights Acts of 1870, 42 U.S.C. § 1981, and of 1866, 42 U.S.C. § 1982, and the Fair Housing Act, and (2) an injunction permanently enjoining the defendants from violating the above-cited statutes.

With regard to the broker-defendants Fischler, Siegel and Matos, the plaintiffs seek an Order requiring them to (1) offer the plaintiffs and their class available apartments that meet their needs; (2) solicit and encourage blacks and hispanics to rent apartments in all Brooklyn neighborhoods, particularly in Midwood, Kings Highway and Sheepshead Bay; (3) advertise in publications such as the Spanish-language El Diario, and the City Sun and The New York Amsterdam News concerning apartments available in all buildings

in [**11] which any defendant has an interest; and (4) submit written reports to the Open Housing Center so that the Open Housing Center can monitor the broker defendants' compliance with this court's order. Additionally, the plaintiffs seek a declaration that defendants Fischler and Matos continued to practice discrimination in violation of a consent decree approved by Judge Korman of this court on August 27, 1984.

As to the landlord-defendants Jakabovitz and Breitman, the plaintiffs request an order directing said defendants to (1) offer plaintiffs and their class available apartments that meet their needs; (2) submit to the Open Housing Center each month a list of all apartments available for rental in all buildings owned by these defendants, with Jakabovitz reserving one-third of the vacancies in his buildings and Breitman reserving one-half of the vacancies in his buildings for financially qualified black or hispanic apartment seekers referred by the Open Housing Center; (3) submit to the Court their rental criteria, which must be the same as with those used with respect to white tenants; (4) explain, in writing, the basis for rejecting a tenant referred by the Open Housing Center; (5) [**12] provide written instructions to all brokers or salespersons employed by these landlord-defendants stating that brokers are to refer all financially qualified applicants to them, regardless of race, color, religion or national origin, and to provide proof of the broker's receipt of such written instructions to the Open Housing Center; (6) post "fair housing" signs in the lobbies of all of their apartment buildings; and (7) advertise available apartments in El Diario and either the City Sun or The New York Amsterdam News whenever the landlord places an advertisement in a newspaper of his choice. The plaintiffs request that the terms of this Order remain in effect for five years from the date of entry.

The Open Housing Center further contends that it will have to hire another person in order to carry out and monitor the enforcement of the equitable relief it seeks. Consequently, it requests that the

Court order the defendant-landlords to pay to the Center "monitoring costs" in the total sum of $ 178,250.00, or $ 35,650.00 per annum, for the five-year period covered by the injunction the plaintiffs seek.

With respect to their motion for attorney's fees, the plaintiffs seek [**13] an award in the sum of $ 975,638.49, including costs and disbursements.

Both Jakabovitz and Breitman oppose the above motions. Jakabovitz contends that the Open Housing Center's work as an "investigator" precludes an award of attorney's fees and equitable relief in the plaintiffs' favor, due to alleged violations of Article 7 of New York State's General Business Law. Similarly, Jakabovitz maintains that since the Open Housing Center's certificate of incorporation [*275] does not authorize it to conduct investigations or bring lawsuits, the Open Housing Center cannot be awarded the relief it seeks. Further, with regard to the fee application, Jakabovitz (1) takes issue with the rates at which plaintiffs' counsel seeks to recover, (2) contends that the attorney's fees and costs the plaintiffs accrued prior to reaching settlements with former defendants in this action are only partially attributable to Jakabovitz, (3) argues that the paralegal fees plaintiffs seek to recover are unreasonable, and (4) maintains that an award of attorney's fees should be in proportion to the damage awards.

In opposition to the motion for attorney's fees, Breitman argues that the computer records submitted [**14] by the plaintiffs do not allow for proper scrutiny and are thus insufficient. With respect to the motion for equitable relief, Breitman contends that because the evidence did not support the jury's verdict as it pertains to Breitman, an award of equitable relief is not proper.

None of the broker-defendants have filed any opposition to the plaintiffs' motions.

Defendant Jakabovitz's Motion

Jakabovitz moves, apparently pursuant to Rule 50 of the Federal Rules of Civil Procedure, to set aside the jury's verdict with respect to the plaintiff Ramsey, on the ground that the plaintiffs allegedly failed to meet their burden of proof after Jakabovitz offered proof of a nondiscriminatory defense.

The plaintiffs oppose this motion on two grounds. First, the plaintiffs argue that the Court should not consider the merits of this motion because Jakabovitz failed to make a Rule 50 motion for "judgment as a matter of law" against Ramsey at the close of the evidence. Second, the plaintiffs contend that they sufficiently demonstrated that the alleged "nondiscriminatory reasons" were actually a coverup for a racially discriminatory reason.

Defendant Breitman's Motion

Breitman moves [**15] for "judgment on the verdict". He contends that because the jury declined to award nominal damages against him and, in fact, confirmed its decision upon further deliberation, the clear intent of the jury's verdict was that judgment be entered in favor of Breitman. In support of this conclusion, Breitman submits two possible reasons for the jury's determination. Specifically, Breitman argues that the jury may have found (1) that Matos did not act within the scope of his agency, or (2) that Matos's discriminatory conduct with respect to Luckett did not relate to Breitman's building.

Breitman also maintains that he is entitled to judgment because he offered a nondiscriminatory defense which the plaintiffs failed to overcome, and because the verdict sheet is ambiguous.

As with Jakabovitz's motion to set aside the verdict as to Ramsey, it is unclear under what procedural rule Breitman moves. Apparently, he also moves pursuant to Rule 50 of the Federal Rules of Civil Procedure.

In opposition to Breitman's motion, the plaintiffs initially contend that Breitman has not met the heavy burden one must satisfy to succeed on a Rule 50 motion. Moreover, the plaintiffs argue that, under the [**16] circumstances presented, the Court must enter an award of nominal damages against Breitman. The plaintiffs further contend that a determination of the merit of Breitman's "nondiscriminatory reasons" was properly within the purview of the jury, which rejected these "nondiscriminatory reasons" in reaching its verdict. Finally, the plaintiffs maintain that the verdict sheet is not ambiguous and note that, even assuming that the verdict sheet is ambiguous, Breitman never objected to its form although he had ample opportunity to review it.

DISCUSSION

I. The Fair Housing Act

In enacting Title VIII of the Civil Rights Act of 1968, commonly known as the "Fair Housing Act" ("the Act") and codified at 42 U.S.C. § 3601 et seq., Congress exercised its power under the Thirteenth Amendment to bar all racial discrimination in the rental or sale of real property. (*See United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 [N.D. Cal. 1973], *aff'd in part, remanded on other grounds*, 509 F.2d 623 [9th [*276] Cir. 1975].) The purpose of the Act "is to protect against conduct which, [**17] either intentionally or in effect, impedes integration and/or perpetuates segregation and discrimination in housing." (*Ragin v. Harry Macklowe Real Estate Co., Inc.*, 801 F. Supp. 1213, 1230 [S.D.N.Y. 1992]. *See also* Armstrong, "Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act", 64 Temple L. Rev. 909, 910 [1991].)

In September 1988, during the pendency of the instant litigation, the Fair Housing Act was amended, with these amendments taking effect March 12, 1989. Whether the pre-amendment Act or the post-amendment Act is applied does not affect the Court's decision

here, except with regard to the issue of attorney's fees, which is discussed below.

Prior to amendment, 42 U.S.C. § 3604 states that it is unlawful

> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> "(b) To discriminate against any person in the terms, conditions, or privileges of sale [**18] or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
>
> * * *
>
> "(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

The amendments to this section added "familial status" to the list of protected classifications.

Under the pre-amendment Act, 42 U.S.C. § 3612 provides for the enforcement of the provisions of the Act by private persons, while under the post-amendment Act, private enforcement is covered by § 3613. Both sections contain similar language.

The Supreme Court has held that a tester, who "may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home," is such a "private person", with standing "by virtue of her allegation that her statutorily created right to truthful housing information was violated." (*Ragin v. Harry Macklowe Real Estate Co., supra*, 801 F.2d at p. 1229 [**19] [quoting from *Havens Realty*

Corp. v. Coleman, 455 U.S. 363, 374, 102 S. Ct. 1114, 1121, 71 L. Ed. 2d 214 (1982)].) Similarly, an entity such as the Open Housing Center has standing upon a showing

> "that it sustained actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision. *See Havens*, 455 U.S. at 378-79; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). Injury in fact can be established by proof that the defendant's 'purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action' [citations omitted] such as . . . 'devoting more time, effort and money to endeavors designed to educate'". (*Ragin v. Harry Macklowe Real Estate Co., supra.*)

II. Nominal Damages in the Breitman Case and Breitman's Motion for "Judgment on the Verdict"

The Open Housing Center contends that, based upon the jury's verdict as recorded on the special verdict sheet, [**20] the entry of an award of nominal damages against the landlord-defendant Breitman is required. The Supreme Court has held that a plaintiff who suffers a deprivation of an absolute right, but is unable to prove actual damages, is "entitled to recover nominal damages not to exceed one dollar." (*Carey v. Piphus*, 435 U.S. 247, 267, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 [1978].) The Second Circuit has interpreted this holding "as requiring an award of nominal damages where the plaintiff proves a deprivation of an absolute right" (*Fassett v. Haeckel*, 936 F.2d 118, 121 [2d Cir. 1991] [emphasis in original]), and has directed district courts to award nominal damages in instances [*277] "when substantive constitutional rights had been

violated but no compensatory damages had been proved." (*Ruggiero v. Krzeminski*, 928 F.2d 558, 563 [2d Cir. 1991] [citation omitted].)

An examination of the special verdict sheet clearly indicates that the jury found Luckett's substantive constitutional rights to have been violated by Breitman's agent. The verdict sheet reads, in pertinent part, as follows:

> "3. Did the [**21] plaintiffs establish that the defendant EMANUEL [sic] FISCHLER, doing business as AM REALTY CO. acted as an "agent" for the defendant BENJAMIN BREITMAN, as the Court has explained that concept to you, with regard to the incident of March 6, 1987 involving testers RONALD LUCKETT and SUSAN HAMOVICH?
>
> YES XX NO
>
> * * *
>
> "5. Do you find that the plaintiff OPEN HOUSING CENTER, INC. established, that on March 6, 1987, RONALD LUCKETT was discriminated against by the defendant CARLOS MATOS because of his race, in violation of Title VIII, the Fair Housing Act?
>
> YES XX NO

Based upon the juror's answers to the clear and unambiguous questions in the special verdict sheet, the evidence presented at the trial, and the Court's extensive jury instructions, it is beyond dispute that the jury found that (1) Matos discriminated against Luckett, in violation of Luckett's constitutional rights, with regard to the renting of a Breitman apartment; and (2) that Matos, as one of AM Realty's salespersons, acted as Breitman's agent. Accordingly, the jury's verdict holds Breitman liable for the discriminatory acts by Matos.

Nevertheless, the jury declined to award either compensatory [**22] damages or nominal damages against Breitman, despite

being directed to return to the jury room to reconsider its seemingly inconsistent verdict. In light of the jury's verdict and the law set forth above, Luckett would have been entitled to an award of nominal damages had he been a plaintiff in this action.

A review of the recent cases involving the Fair Housing Act indicates that Congress has granted to organizations like the Open Housing Center standing to assert the rights of third parties, such as Luckett, under the circumstances presented in this case. (*See Huertas v. East River Housing Corp.*, 81 F.R.D. 641 [S.D.N.Y. 1979]; *see also Seniors Civil Liberties Ass'n v. Kemp, supra*, 965 F.2d at p. 1033; *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261, 270 [S.D.N.Y. 1991] ["under the Fair Housing Act], the distinction between 'third party' and 'first party' standing is of little significance"]; *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1052-53 [E.D. Va. 1987] [criteria for representative standing].) Consequently, the Court should have instructed [**23] the jury to award nominal damages not to exceed one dollar in favor of the Open Housing Center and against Breitman. The Second Circuit has held that a district court's failure to make such an instruction constitutes error. (*Fassett v. Haeckel, supra*, 936 F.2d at p. 121.) Accordingly, the Court now corrects this error, grants the Open Housing Center's motion, and directs an award of nominal damages in the sum of $ 1.00 against Breitman. (*Fassett v. Haeckel, supra; Ruggiero v. Krzeminski, supra*, 928 F.2d at p. 564.)

The Court considered Breitman's arguments in support of his motion to set aside the jury's verdict and in opposition to the Open Housing Center's motion for nominal damages and finds them to be without merit. Initially, the Court notes that Breitman does not cite any rule as authority for his motion. Assuming that his motion is for judgment as a matter of law under Rule 50(b), Breitman has failed to satisfy the heavy burden necessary to set aside a jury verdict.

A motion to set aside a jury verdict, formerly known as "judgment notwithstanding the verdict", or motion "j.n.o.v.", [**24] is covered

by Rule 50 of the Federal Rules of Civil Procedure and is now known as a motion for "judgment as a matter of law".

Rule 50(a) provides, in pertinent part:

> "(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary [*278] basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.
>
> "(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

Rule 50(b), entitled "Renewal of Motion for Judgment After Trial" continues, in pertinent part:

> "Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination [**25] of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . ."

A party who has failed to move pursuant to Rule 50(a) at the close of the presentation of evidence, formerly known as a motion for a "directed verdict", is precluded from moving under Rule 50(b) (for the former judgment n.o.v.) after the jury returns its verdict. (*Meriwether v. Coughlin*, 879 F.2d 1037, 1044 [2d Cir. 1989];

Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 816-17 [2d Cir. 1970] [party's failure to move for directed verdict during trial bars consideration of motion for judgment n.o.v.]; *Posadas de Mexico, S.A. de C.V. v. Dukes*, 789 F. Supp. 121, 123-24 [S.D.N.Y. 1992].)

The standard for granting a Rule 50(b) motion is the same as that for a Rule 50(a) motion, namely, such a motion should be granted when "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could [**26] have reached." (*Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 [2d Cir. 1992]. *See also Jund v. Town of Hempstead*, 941 F.2d 1271, 1290 [2d Cir. 1991] [citations omitted] [a rule 50(b) motion should be granted when "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him."])

However, "courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." (*Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 134 [2d Cir. 1986].)

Based upon the law as stated above, the Court declines to set aside the jury's verdict. While, in the testimony involving Luckett, there was reference to another apartment in a building not owned by Breitman, substantial evidence was adduced that this incident [**27] concerned Matos's failure to offer Luckett the apartment in Breitman's building. To find that the jury even considered any other property in arriving at its determination with regard to this part of its verdict would be pure speculation. Even a cursory review of the

trial transcript indicates a sufficient evidentiary basis for the jury's conclusion fixing liability on Breitman.

Further, the possible "nondiscriminatory reasons" for Matos's conduct offered by Breitman were properly for the jury's consideration and were apparently rejected. (*See United States v. Balistrieri*, 981 F.2d 916 [7th Cir. 1992].) Had the jury accepted any of these reasons as the basis for the difference between the treatment of Luckett and that of the white tester, the jury would have answered "no" to question number five. Again, there is ample evidence to support the jury's determination in this regard.

Breitman places great weight on what he apparently perceives to be the singularity of the jury's failure to award even nominal damages against him, even after being instructed by the Court to reconsider its verdict. Cases in which a jury has found a constitutional violation [**28] yet declined to award nominal damages or awarded nominal damages only after [*279] the court's direction are not unusual. (*See, e.g., Fassett v. Haeckel, supra*, 936 F.2d at p. 120 [jury declines to award nominal damages]; *Ruggiero v. Krzeminski, supra*, 928 F.2d at p. 561 [court directs nominal damages award].) A determination from the jury's failure to award nominal damages that it intended to exculpate Breitman is unwarranted. Rather, in the not uncommon circumstances presented here, the Second Circuit has instructed that the Court enter an award of nominal damages against the defendant.

Breitman's other arguments merit little discussion. His contention that the jury may have found that Matos was not acting within the scope of his agency for Breitman is disproven by the jury's "yes" answer to question number three. Breitman's argument that the verdict sheet is "ambiguous" is belied by his failure to clearly object to it in a specific manner, despite being given ample opportunity for review, as follows:

> "THE COURT: Does anybody have any questions or anything else?"

MR. WAGMAN: I am troubled, frankly, your Honor, [**29] by the third item on the verdict sheet.

THE COURT: Yes.

MR. WAGMAN: Since your Honor in telling us this morning —

THE COURT: That's the agency?

MR. WAGMAN: Yes. Because your Honor told us this morning about the charges on agency that you were going to give, which involved control and scope of authority, and this third question, it seemed to me, requires some subquestions, because even under the charge as your Honor described it, acting as agent for the rental of apartments doesn't carry with it acting as agent if the discrimination that is described in number five is found. It just doesn't follow.

THE COURT: I could not possibly begin to subdivide that question. It is a very complex and not a very clear concept. It is a very, very difficult concept. And you will notice that I specifically said, as the Court has explained that concept to you.

MR. WAGMAN: I noticed that and appreciate it.

THE COURT: That's the only way I can do it that is fair. Because when I go over the verdict sheet which the jury will have when I do that, I will tell them that I am now talking about the part of the charge where I discussed with you the concept of agency by and between [**30] the landlord as principals and the AM Realty Co. broker as agent. That's the best I can do. The first question is really separate and apart from two and three, because that's under the scope of the authority as an employee. So it is two and three that

are separate. The only other agency theory we are talking about that they might be mixed up is the agency between the clients and the brokers. And I am not talking about that at all.

MR. WAGMAN: You are not, your Honor.

THE COURT: You see, sometimes brevity is better than getting everybody too confused and inconsistent.

I am telling you now that this jury will not leave with an inconsistent verdict, if we have to stay here all month, as I said.

The more questions on that subject in my view, the more possibility of problems. And I think it is as fair to you as it is to the plaintiffs.

In the exercise of my discretion I thought that is the best question. Not only that, but I spent an awfully lot of time, and this is about the sixth version that you saw for the first time of this verdict sheet.

MR. WAGMAN: I am sure, your Honor.

THE COURT: The one given to me by plaintiff's counsel with all due respect made my head [**31] whirl. I don't want to have my head whirl, nor the jury's head as well.

Brevity and simplicity that's my experience with jury verdict sheets. I am very experienced in drawing jury verdict sheets, because this is the best I can do.

Unless you come up with a better idea and I will be glad to listen to it.

[*280] MR. WAGMAN: Thank you, Judge."

(Tr. 1646-48.)[1]

Breitman's counsel was thus given an opportunity to "improve" the question on the verdict sheet, but declined to do so. Breitman's further arguments concerning the alleged ambiguity of the verdict sheet are merely a restatement of his original arguments, which the Court has previously rejected. The Court now adheres to that determination.

In light of the evidence presented, the law in the Second Circuit, and after considering the arguments of the parties, the Court denies Breitman's motion for "judgment on the verdict" and grants the Open Housing Center's motion for an award of nominal damages [**32] against Breitman. The Court directs that the Open Housing Center be awarded nominal damages in the sum of one dollar ($ 1.00) against the landlord-defendant Breitman.

II. Jakabovitz's Motion to Set Aside the Verdict

Jakabovitz moves to "set aside the verdict as to Ramsey". Apparently, this motion is for judgment as a matter of law pursuant to Rule 50(b). Although a review of the trial transcript reveals a lengthy conversation between Jakabovitz's counsel and the Court at the close of the plaintiffs' case, with counsel for Jakabovitz making several motions, there is no indication of Jakabovitz having moved for judgment as a matter of law with respect to Ramsey's claims, as is required. (*See* Tr. 1235-47.) Accordingly, Jakabovitz's motion to "set aside the verdict as to Ramsey" is denied.

III. Equitable Relief

Prior to the Act's amendment, 42 U.S.C. § 3612(c) stated, in pertinent part:

---

[1] Citations to "Tr." refer to pages of the trial transcript.

> "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order . . . ."

Post-amendment § 3613 contains the same language.

Similarly, the Civil Rights Acts of [**33] 1866 and 1870 have been construed to permit injunctive relief: "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not . . . prevent a federal court from fashioning an effective equitable remedy." (*Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc.*, 599 F. Supp. 79, 81-82 [E.D.N.Y. 1984].)

Extensive discrimination is not essential to the issuance of an injunction. (*Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc., supra*, 599 F. Supp. at p. 82 [quoting the Fourth Circuit in *United States v. Hunter*, 459 F.2d 205, 218 n.17 (4th Cir.), *cert. denied*, 409 U.S. 934, 93 S. Ct. 235, 34 L. Ed. 2d 189 (1972): "[A] pattern or practice . . . is not an indispensable prerequisite . . . Relief may be based on a single (unintentional) violation . . . when . . . a group of persons are denied their statutory rights and the case raises an issue of general public importance."]) Since "an injunction will benefit others besides the suing plaintiff, the propriety [**34] of imposing that equitable remedy depends on each suit's facts — not on the number of violations or movants involved. The question, rather, is whether 'the facts . . . were sufficiently flagrant to support that remedy.'" (*Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc., supra*, 599 F. Supp. at p. 82 [quoting from *Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978)].)

A district court hearing a fair housing cane *[sic]* is "fully empowered to eliminate the present effects of past discrimination", and may order the appropriate affirmative action to achieve this goal. (*United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 228 [5th Cir. 1971]. *See Armstrong, supra* at p. 929.) The Court "has not

merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (*Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225, 1250-51 [S.D.N.Y. 1980] [citing *Louisiana v. United States*, 380 U.S. 145, 154, 85 S. Ct. 817, 822, 13 L. Ed. 2d 709 (1965) [**35] and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, [*281] 95 S. Ct. 2362, 2372, 45 L. Ed. 2d 280 (1975)].) However, "[a] court should not grant injunctive relief unless there exists some cognisable danger of recurrent violation." (*Ragin v. Harry Macklowe Real Estate Co., supra*, 801 F. Supp. at p. 1235 [citation omitted].)

Injunctive relief is appropriate in this case based upon the defendants' discriminatory treatment of the black and hispanic plaintiffs. (*See United States v. Youritan Constr. Co., supra*, 370 F. Supp. at p. 651.) The Court has considered the evidence and arguments submitted by the parties and finds that equitable relief is warranted.

The jury's award of punitive damages against all of the defendants except Breitman is noteworthy. As the Court instructed the jury,

> "In addition to actual damages, the law permits the jury under certain circumstances to award punitive damages to an injured plaintiff in order to punish a wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. If you find from a preponderance [**36] of the evidence in the case that a plaintiff is entitled to a verdict for actual or nominal damages, and you further find that the act or omission of the defendant which proximately caused injury or damage to the plaintiff was maliciously or wantonly or oppressively done, then you may add to the award of actual or nominal damages such amount as you shall

unanimously agree to be proper as punitive damages." (Tr. 1748 [emphasis supplied].)

That the jury awarded punitive damages against all of the defendants except Breitman demonstrates the jury's view that the conduct of defendants Jakabovitz, Fischler, Matos and Siegel constituted flagrant discrimination.

Equally significant is the jury's determination that Jakabovitz violated 42 U.S.C. § 1981 and 1982 with regard to his personal dealings with Ramsey. To find such a violation, the jury had to determine that Jakabovitz intentionally discriminated against Ramsey.

Considering the totality of the above circumstances, along with all of the evidence adduced at trial and the papers submitted by the parties post-trial, the Court finds that injunctive relief is proper as these defendants would [**37] likely engage in future discriminatory activity. (*See Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc., supra*, 599 F. Supp. at p. 83 [injunction warranted even though only one discriminatory act proven].) The Court further finds that any harm the defendants would suffer as the result of an injunction is heavily outweighed "by the character and extent of the violations found here and the likelihood that violations will recur absent issuance of an injunction." (*Williamsburg Fair Housing Co. v. New York City Housing Auth., supra*, 493 F. Supp. at p. 1251.) Accordingly, the Court grants the equitable relief set forth below.

The Court has conducted an extensive review of the cases in the Second Circuit and other circuits in which equitable relief was awarded to rectify incidents of housing discrimination. (*See, e.g., United States v. Starrett City Assocs.*, 660 F. Supp. 668 [E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 [2d Cir.], *cert. denied*, 488 U.S. 946, 102 L. Ed. 2d 365, 109 S. Ct. 376 [1988]; *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79 [**38]

[E.D.N.Y. 1984]; *Williamsburg Fair Housing Corp. v. New York City Housing Auth.*, 493 F. Supp. 1225 [S.D.N.Y. 1980]. *See also United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 [5th Cir. 1971]; *United States v. Keck*, No. C89-1664C, 1990 U.S. Dist. LEXIS 19309 [W.D. Wash. November 15, 1990]; *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 [E.D. Mich. 19771; *Zuch v. Hussey*, 394 F. Supp. 1028 [E.D. Mich. 1975]; *United States v. Youritan Constr. Co.*, 370 F. Supp. 643 [N.D. Ca. 1973], *aff'd in part*, remanded on other grounds, 509 F.2d 623 [9th Cir. 1975].)

While much of the relief awarded in these cases is worthwhile, such as requiring advertising in certain periodicals or holding seminars on fair housing, the Court finds that this kind of remedy, without more, would ultimately fail to ameliorate the defendants' previous discriminatory conduct or deter future [*282] discrimination by these defendants and others.

Apparently, the only case in which a court awarded [**39] relief of the type the Court believes would be most effective is *Williamsburg Fair Housing Comm. v. New York City Housing Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980) (earlier proceeding at 450 F. Supp. 602 [S.D.N.Y. 1978].) In *Williamsburg*, the plaintiffs sued various defendants under, inter alia, the Fair Housing Act and 42 U.S.C. §§ 1981-83, for the employment of race-based quotas in the rental of vacant apartments in housing projects located in the Williamsburg section of Brooklyn. After exhaustive negotiations, most of the parties resolved their disputes and agreed to a consent decree, which required the housing projects to increase the number of non-white tenants and attain certain ratios of non-white tenants to white tenants. One group of defendants (the "Bedford defendants"), however, did not enter into the consent decree and opposed the district court's approval of it as it pertained to the other parties.

The plaintiffs moved for injunctive relief against the Bedford defendants. After a trial, Judge Tenney found that the Bedford

defendants had indeed discriminated against [**40] non-whites in violation of the applicable statutes. Accordingly, he granted injunctive relief against the Bedford defendants, requiring them to abide by the terms of the consent decree. Consequently, the Bedford defendants were required to rent a certain number of their vacant apartments to non-white tenants in order to achieve the ratios of non-white tenants to white tenants set forth in the consent decree.

At this point, the Court notes that the culpability of the two landlord-defendants in this case is not equal. While the jury's verdict evidences the conclusion that Jakabovitz flagrantly discriminated against the plaintiffs, the same cannot be said for Breitman. As to Breitman, his liability is vicarious, attributable primarily to the discriminatory practices of AM Realty. Furthermore, in declining to award punitive damages against Breitman, the jury determined that he had not acted maliciously, wantonly or oppressively.

While the Court considers the relief the plaintiffs seek against the landlords much too severe and extreme, the Court is of the opinion that the only way to remedy the discrimination on the part of Jakabovitz and prevent future discriminatory activity is [**41] by ordering Jakabovitz to set aside a percentage of the vacancies which arise in his buildings and offer them first to qualified minority candidates, in addition to other remedies. Under the circumstances presented in this case, anything short of such relief would not adequately address the Fair Housing Act's goals of increasing housing integration and eliminating residential segregation.

Accordingly, the Court directs the following equitable relief:

Declaratory Relief

The Court declares that the actions of all of the defendants violated Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, codified at 42 U.S.C. § 3601 et seq.

The Court further declares that the acts of Jakabovitz with respect to the plaintiff Jeanette Ramsey violated the Civil Rights Acts 1870, 42 U.S.C. § 1981, and the Civil Rights Act of 1866, 42 U.S.C. § 1982.

The Court further declares that the broker-defendants Fischler and Matos continued to practice discrimination in violation of the consent decree of August 27, 1984.

Injunctive Relief

The broker-defendants [**42] Fischler, Matos and Siegel and the landlord-defendants Jakabovitz and Breitman are permanently enjoined from

(1) making unavailable or denying any apartment to any person on account of race, color, religion or national origin;

(2) discriminating against any person in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection with such rental, because of race, color, religion or national origin;

(3) making, printing or publishing, or causing to be made, printed or published, any notice, statement or advertisement, with respect [*283] to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion or national origin;

(4) representing to any person because of race, color, religion or national origin that any dwelling is not available for inspection or rental when such dwelling is in fact available; and

(5) engaging in any other discriminatory acts and practices that contribute to racial segregation.

Affirmative Relief

When Fischler, Matos and/or Siegel advertises, in any newspaper, magazine or other media, an apartment available in any building in which any defendant [**43] has an interest, he/they shall place a similar advertisement in El Diario and either the City Sun or The New York Amsterdam News.

Additionally, for each and every real estate agency in which Fischler has an interest or obtains such an interest in the future, or is a principal, officer or director, or becomes a principal, officer or director, he shall educate all of his sales personnel with respect to the kind of conduct that is required by and prohibited by this Order, and shall advise such salespersons that failure to comply with instructions given as to the conduct required by and prohibited by this Order may result in termination as a salesperson or other appropriate action, including sanctions under this Order. This instruction shall be given within thirty days after the date of this Order for each real estate agency in which Fischler has a current interest, stake or office, and within fifteen days of contracting with any new salesperson or acquiring any interest, stake or office in any real estate agency. Further, such instruction shall be repeated at least bi-annually with respect to all such persons.

Both Jakabovitz and Breitman shall each undertake the following: [**44]

> (1) change their business's letterhead, stationery or other correspondence paper to include the statement "Equal Housing Opportunity" and the Equal Housing Opportunity logo;
>
> (2) once per week for a twelve-week period commencing ten days after the date of this Order, place an advertisement no smaller than two column inches in the New York Times, El Diario, and either New York Amsterdam News or City Sun, stating the

following: "Notice of Non-Discriminatory Policy in the Rental of Apartments [The defendant and his company or companies] welcome applications from qualified minority apartment seekers for the rental of available apartments in [his or their] apartment buildings. [The defendant and his company or companies] do not discriminate on the basis of race, color, religion or national origin in the rental of available apartments.";

(3) within thirty days from the date of this Order, in a letter signed by the defendant, notify each real estate broker which lists one or more vacancies in any of the defendant's buildings that the defendant and his company or companies is an equal housing opportunity lessor willing to consider all applications without regard [**45] to race, color, religion or national origin. A copy of this letter shall be sent to the plaintiff Open Housing Center, along with a list of all brokers and/or agencies to whom the letter is sent;

(4) for each advertisement of an apartment available for rental placed by the defendant in any newspaper, place a similar advertisement in El Diario and either the New York Amsterdam News or City Sun. The advertisement in El Diario and either the New York Amsterdam News or City Sun shall run for the same period of time as the advertisement in the other newspapers);

(5) each advertisement of an apartment(s) available for rental shall include a statement, prominently placed and easily legible, to the effect that all property listed in the advertisement is available for rental without regard to race, color, religion or national origin;

(6) prominently place a Fair Housing sign, of the type recommended by the Department of Housing and Urban Development (*see* 24 C.F.R. Parts 109, 110) and attached to the Affidavit of Phyllis Spiro as exhibit "F", in a [*284] location clearly visible to all persons in, or immediately outside, each of the defendant's offices, and in the lobby [**46] of each of the defendant's buildings. When posted in the lobby of the defendant's building, the name, address and telephone number of the owner or management company of the building shall also be noted on the sign;

(7) within thirty days from the date of this Order, provide the Open Housing Center with the defendant's rental criteria, including the maximum number of persons who can occupy a one bedroom or studio apartment, the minimum length of time an applicant must have been employed proper to applying for an apartment, whether pets are allowed, and required financial status. The required financial status shall be the same for non-white tenants as for white tenants; and

(8) keep an "Applicant Flow Log" for each building, wherein shall be kept relevant information about each applicant, including an applicant's name, apartment sought, receipt date of application, applicant's race, color or national origin, and whether the applicant was accepted for rental or rejected. If a minority applicant is rejected for rental, the basis for such rejection shall be plainly stated in the "Applicant Flow Log" under the heading "reason for rejection". The recording of an applicant's race, color [**47] or national origin shall be solely for the purpose of complying with this Order and shall not be considered discriminatory.

In addition, Jakabovitz only shall undertake the following:

(1) for every fourth vacancy which arises in the "Jakabovitz unit", as defined below, Jakabovitz shall inform the Open Housing Center of such vacancy;

(2) for a seven-day period commencing with the day after notice is given, in accordance with the rental criteria provided to the Open Housing Center as required by this Order, the Open Housing Center shall refer qualified minority apartment seekers to Jakabovitz. During this seven-day period, Jakabovitz shall show the vacant apartment to and interview only the candidates referred by the Open Housing Center. Moreover, during this seven-day period, Jakabovitz shall refrain from advertising the vacant apartment in any newspaper, magazine, or other media;

(3) if Jakabovitz rejects a prospective tenant referred by the Open Housing Center, he must inform the Open Housing Center and the applicant of the basis for this rejection. Such notification must be received by the Open Housing Center immediately upon the rejection;

(4) if, at the conclusion of [**48] this seven-day period, the vacant apartment has not been rented to an applicant referred by the Open Housing Center, Jakabovitz may proceed to rent the apartment in his usual fashion;

(5) the "Jakabovitz unit" is comprised of the following seven buildings:

1. 915 84th Street
2. 1579-1599 West 10th Street
3. 154-164 Avenue P
4. 1327-1337 46th Street
5. 2001-2013 Avenue P
6. 1530 East 19th Street
7. 301 Oriental Boulevard

General Information

(1) This order shall be effective for two years from the date of this Order, except as otherwise noted.

(2) The terms of this order shall be liberally construed to accord with the equal opportunity housing mandates of 42 U.S.C. §§ 1981 and 1982 and the Fair Housing Act, 42 U.S.C. § 3601 et seq.

(3) The Court declines to award the Open Housing Center any sums for "monitoring" or other costs.

The Court has reviewed the opposition submitted by Jakabovitz to an award of equitable relief and finds his arguments to be without merit. Breitman primarily restates his arguments for "judgment on the verdict", which the Court previously addressed. [**49]

Jakabovitz argues that the Open Housing Center is not entitled to equitable relief because it lacked a private investigator's license in violation of New York State law. However, Jakabovitz cites no authority for his contention that the Open Housing [*285] Center's actions constituted a "private investigation" as defined by New York law. Indeed, the Supreme Court has expressly approved the practice of "testing" employed by the Open Housing Center. (*See Havens Realty Corp v. Coleman, supra,* 455 U.S. at p. 373, 102 S. Ct. at p. 1121.) Moreover, assuming that the Open Housing center violated New York State law, Jakabovitz has supplied the Court with no case which holds that the appropriate remedy is the denial of equitable relief. Without any supportive authority, this argument is rejected.

In a similar vein, Jakabovitz argues that the Open Housing Center's certificate of incorporation does not provide for "investigations". Again, however, Jakabovitz. fails to provide support for his contention that the appropriate remedy for such a violation is the denial of equitable relief. In any event, the Court finds that the Open Housing Center's [**50] "tests" do not violate this certificate. (*See* Reply Affidavit of Phyllis Spiro, Exh. "A" [the purposes of the Open Housing center include "to promote the goals of fair housing laws, facilitate equal access to housing and assist members of the public who seek to enforce their rights . . . ."].) It should also be noted that the Department of Housing and Urban Development, the primary source for funding for the Open Housing Center, expressly approves the administration of investigations of housing discrimination by organizations such as the Open Housing Center. (*See* Reply Affidavit of Phyllis Spiro, Exh. "B" [subsection entitled "Program Coverage"].)

Finally, Jakabovitz argues that to award the relief sought by the Open Housing center would violate New York State General Business Law Article 12-a concerning the licensing of real estate brokers. Specifically, Jakabovitz contends that the statute would be violated by an award of a sum for monitoring costs as sought by the Open Housing center. Since the court declines to award the Open Housing center any such fee for monitoring costs or any other sum for the implementation of the above program, Jakabovitz's argument on this [**51] point is moot.

IV. Attorney's Fees and Costs

42 U.S.C. § 1988(b) provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than

> the United States, a reasonable attorney's fee as part of the costs."

Similarly, subsection § 3612(c), prior to amendment, further provides, in pertinent part:

> "The court may grant as relief, as it deems appropriate . . . court costs and reasonable attorney fees in the case of a prevailing plaintiff: provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees."

In its amendment of the Fair Housing Act, Congress abrogated the provision requiring the plaintiff to be in a state of financial need in order to recover attorney's fees. (42 U.S.C. § 3613[c][2] 1989].) While the amended section applies to fees incurred after the effective date of the amendment, the question arises as to whether [**52] the plaintiffs must show financial need in order to recover for fees incurred prior to the amendments' effective date. The Second Circuit has not addressed the issue of the retroactive application of any of the Fair Housing Act amendments.

"The Supreme Court's current position on retroactive application of civil statutes is, as the Court itself has acknowledged, somewhat unclear." (*Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 921 [2d Cir. 1992].) In *Bradley v. School Bd.*, 416 U.S. 696, 710, 94 S. Ct. 2006, 2015, 40 L. Ed. 2d 476 (1974), the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Later, however, in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493 (1988), the court pronounced "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be [*286] construed to have retroactive effect unless their language requires this result." [**53]

While the Court in *Bowen* deviated from its holding in *Bradley*, it did not expressly overrule that case. One circuit court has stated that *Bradley* should be applied only to cases which present similar circumstances. (*Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 938 [7th Cir. 1992].)

Under this standard, the *Bradley* test is applicable here. *Bradley* concerned the retroactive application of section 718 of Title VII of the Emergency School Aid Act, which granted a federal court authority to award reasonable attorney's fees in a school desegregation case; before passage of that statute, there had been no provision for a fee award in such a case. The instant case, while similar, does not involve that degree of change, as it concerns a statutory amendment which simply modifies the criteria for receiving a fee award. The amendment at issue here does not create a new remedy.

Moreover, a review of recent Second Circuit decisions indicates that, despite *Bowen*, the *Bradley* standard is still entitled to consideration. (*See, e.g., Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 723 [2d [**54] Cir. 1990).)

In *Bradley*, the Supreme Court set forth the following formula for courts to use in determining the retroactive application of statutes: a court should consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." (*Bradley v. School Bd., supra*, 416 U.S. at p. 718, 94 S. Ct. at p. 2019.)

All three prongs of the *Bradley* test are satisfied by the circumstances presented in the instant case. With regard to "the nature and identity of the parties", "housing discrimination litigation is of a kind different from 'mere private cases between individuals'" in which "manifest injustice" could result. (*United States v. Rent Am., Corp.*, 734 F. Supp. 474, 479 (S.D. Fla. 1990] [quoting from *Bradley v. School Bd. of the City of Richmond, supra*, 416 U.S. at

p. 718, 94 S. Ct. at p. 2019].) In cases involving "great national concerns . . . the court must decide according to existing laws." (*Bradley v. School Bd. of the City of Richmond, supra*, 416 U.S. at p. 719, 94 S. Ct. at p. 2020 [**55] [quoting from *United States v. Schooner Peggy*, 5 U.S. 103, 1 Cranch 103, 2 L. Ed. 49 (1801)].)

With regard to "the nature of [the parties'] rights", *Bradley* states that a court should not apply a statute retroactively when to so do would "infringe upon or deprive a person of a right that had matured or become unconditional." (*Bradley v. School Bd., supra*, 416 U.S. at p. 718, 94 S. Ct. at p. 2019.) In this case, the defendants would not be deprived of any such right if the attorney's fees provision is applied retroactively. The defendants' discriminatory practices "were unlawful before the effective date of the 1988 Act; they have no 'right' to avoid new penalties for the conduct which was unlawful at the time it occurred." (*United States v. Rent Am., Corp., supra*, 734 F. Supp. at p. 480.)

The third element of the *Bradley* test concerns "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." (*Bradley v. School Bd., supra*, 416 U.S. at pp. 720-21, 94 S. Ct. at pp. 2020-21.) [**56] Applying the attorney's fees provision of the amended Act here neither changes the substantive obligations of the defendants nor increases their burden, as damages and attorney's fees could be imposed upon the defendants under the pre-amendment Act. (*see United States v. Rent Am., Corp., supra*, 734 F. Supp. at p. 480.) Retroactive application of the attorney's fees provision of the amended Act does not impose additional or unforeseeable obligations on the defendants. (*See id.*)

Moreover, "a request for attorney's fees should not result in a second litigation. " (*Smiley v. Sincoff*, 958 F.2d 498, 501 [2d Cir. 1992] [quoting from *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983)].) Failure to apply the amended attorney's fees provision retroactively would require the

Court to hold a hearing into the plaintiffs' financial status. Such a proceeding would require the parties to incur additional expenses and may be an unnecessary expenditure of judicial resources for the following reasons: (1) a substantial part of the plaintiffs' attorney's fees would [**57] [*287] not be affected by the hearing's outcome, as they were incurred after the effective date of the amendments; (2) as the Open Housing Center is a not-for-profit organization, there is a reasonable likelihood that it is financially unable to meet the legal costs it incurred in this case; and (3) the defendants have stated that in order to prepare for such a hearing, they will require further discovery.

The defendants argue that because congress postponed the effective date of the amendments, it was congress's intention that the amendments apply prospectively only. It has been stated that the "delayed effective date constitutes 'statutory direction' that the amendments are to be applied prospectively only". (*Ragin v. Harry Macklowe Real Estate Co., Inc., supra*, 801 F. Supp. at p. 1228 n.8 September 1988 amendments to the Fair Housing Act apply prospectively only].) While the effective date is evidence of congress's intent, it is hardly conclusive. The Court found nothing in the legislative history which indicates that Congress intended the amended attorney's fees provision to apply prospectively only. (*Cf. Kaiser Aluminum Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839, 110 S. Ct. 1570, 1578 108 L. Ed. 2d 842 [**58] [1990] [plain language of statute and legislative history, together with postponement of statute's effective date, indicated prospective application only].)

The purpose of the amendment to the Fair Housing Act's fee provision was to "bring [ ] attorney's fee language in title VIII closer to the model used in other civil rights laws." (H. Rep. No. 711, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S.C.C.A.N. 2173, 2174.) The Court finds that this goal is best served by applying the amended attorney's fees provision of the Fair Housing Act to the circumstances presented in this case.

Moreover, it should be noted that in the case cited by the defendants for the proposition that the delayed effective date indicates prospective application only, *Ragin v. Harry Macklowe Real Estate Co., Inc.*, 801 F. Supp. 1213, 1228 n.8 (S.D.N.Y. 1992), the court was considering the application of a limitations period. Similarly, in *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 761 F. Supp. 1528, 1543-44 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992), another case cited by the defendants, the question [**59] before the court concerned the effect of the amendments on substantive rights, specifically, what type of housing was covered by the Act. In the instant case, however, the defendants' substantive rights are not implicated by retroactive application of the amended attorney's fees provision. Instead, the only consideration is one of the penalties for the defendants' prior discriminatory activities.

Accordingly, the Court will apply the attorney's fees provision of the Fair Housing Act, as amended, to the plaintiffs' entire fee application. This section of the amended Act provides "In any civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs. . . ." (42 U.S.C. § 3613[c]2] [Supp. 1992).) The plaintiffs are not required to show financial inability to pay their attorney's fees in order to receive a fee award.

In order to obtain an award of attorney's fees under either the Fair Housing Act or § 1988, one must be a "prevailing party." The Supreme Court has defined a "prevailing party" as one who succeeds on "any significant issue in litigation [**60] which achieves some of the benefit the parties sought in bringing suit." (*Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1493, 103 L. Ed. 2d 866 [1989]. *See also Hensley v. Eckerhart, supra*, 461 U.S. at p. 433, 103 S. Ct. at p. 1939.) A plaintiff who wins nominal damages is such a "prevailing party". (*Farrar v. Hobby, U.S.* , 113 S. Ct. 566, 121 L. Ed. 2d 494 [1992].)

The amount of an award of attorney's fees in a civil rights case is determined by using the "lodestar" method. (*Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 945, 103 L. Ed. 2d 67 [1989]; *Hensley v. Eckerhart, supra*, 461 U.S. at p. 433, 103 S. Ct. at p. 1939.) The amount of the fee award is initially estimated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563, 106 S. Ct. 3088, 3097, [*288] 92 L. Ed. 2d 439 [1986].) [**61] A reasonable attorneys fee

> "is one calculated on the basis of rates and practices prevailing in the market, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,' [citation omitted], and one that grants the successful civil rights plaintiff a 'fully compensatory fee,' [citation omitted], comparable to what 'is traditional with attorneys compensated by a fee-paying client.'" (*Missouri v. Jenkins*, 491 U.S. 274, 286, 109 S. Ct. 2463, 2470, 105 L. Ed. 2d 229 (1989) [citation omitted]. *See also Blum v. Stenson*, 465 U.S. 886, 895-96 & n.11, 104 S. Ct. 1541, 1547-48, 79 L. Ed. 2d 891 & n.11. [1984].)

The amount of an award, however, must ultimately be determined on the facts of the case. (*Hensley v. Eckerhart, supra*, 461 U.S. at p. 429, 103 S. Ct. at p. 1937.)

The Second Circuit has noted that of particular applicability in determining the amount of an award of attorney's fees in a civil rights case are the twelve factors set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974). [**62] (*United States Football League v. National Football League*, 887 F.2d 408, 415 [2d Cir. 1989] [citing *Johnson*], *cert. denied*, 493 U.S. 1071, 107 L. Ed. 2d 1022, 110 S. Ct. 1116

[1990].) These factors are: (1) the time and labor required; (2) the novelty of the legal questions; (3) the skill level required; (4) whether accepting the case precluded the attorney from accepting other work; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or situation; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the relationship with the client; and (12) awards made in similar cases. (*See, e.g., Blanchard v. Bergeron, supra*, 109 S. Ct. at p. 943 n.5 [citing *Johnson v. Georgia Highway Express, Inc., supra*].) The Court notes, however, "that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." (*United States Football League v. National Football League, supra.*) [**63]

Pursuant to 42 U.S.C. § 3613(c)(2), the plaintiffs can recover reasonable attorney's fees and costs from each defendant. Additionally, the plaintiffs can recover attorney's fees and costs from Jakabovitz pursuant to 42 U.S.C. § 1988.

The plaintiffs seek an award of attorney's fees in the sum of $ 883,386.50, plus $ 92,251.99 for costs and disbursements, for a total sum of $ 975,638.49. This application seeks compensation for approximately 4,800 attorney-hours and 1,500 paralegal-hours. The Court has considered the arguments of all parties and the records submitted by the plaintiffs, and awards attorney's fees in the sum of $ 335,280.20, including costs and disbursements, against all defendants as set forth below.

Jakabovitz contends that the rates at which the plaintiffs' counsel seeks to recover are too high and must be reduced. For example, David N. Brodsky, the plaintiffs' "lead attorney", charges rates ranging from $ 300 to $ 425 per hour, while associates charge rates as high as $ 270 per hour.

Prevailing parties "are entitled to reasonable hourly rates which fall within the prevailing marketplace [**64] rates in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." (*New York State Nat'l Org. for Women v. Terry*, 737 F. Supp. 1350, 1361 [S.D.N.Y. 1990] [citation omitted], *aff'd in part, rev'd in part on other grounds*, 961 F.2d 390 [2d Cir. 1992].) The Court has reviewed the applicable law in this Circuit and determines that, based upon the type of work performed and the experience of the attorneys, the following maximum rates are reasonable: for partners, no more than $ 200 per hour; for associates, no more than $ 135 per hour. (*See, e.g., Huntington Branch NAACP v. Town of Huntington*, 749 F. Supp. 62, 65 E.D.N.Y. 1990] [rates of $ 135-$ 225 per hour appropriate in housing discrimination case, where counsel performed "extremely ably" and have experience in civil rights cases]; *Clarke v. Frank*, No. 88 CV 1900, 1991 U.S. Dist. LEXIS 10601 [*289] [E.D.N.Y. July 26, 1991] [$ 200 per hour rate reasonable in civil rights case]. *See also Jennette v. New York*, 800 F. Supp. 1165, 1169 [**651 S.D.N.Y. 1992] [sole practitioner with ten years' experience in civil rights actions awarded $ 200 per hour]; *Nu-Life Constr. Corp. v. Board of Educ.*, 795 F. Supp. 602, 606 [E.D.N.Y. 1992] [counsel awarded fees at rates of $ 165-$ 200 per hour in RICO action]; *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1237, 1246 [counsel inexperienced in civil rights cases awarded $ 175 per hour for partners, $ 100 per hour for associates], *aff'd*, F.2d [2d Cir. Jan. 26, 1993] [available on Lexis at 1993 U.S. App. LEXIS 1181]; *Ortiz v. Regan*, 777 F. Supp. 1185, 1188-89 [S.D.N.Y. 1991] [counsel seeking $ 300-$ 400 per hour in pension case awarded $ 250 per hour], aff'd in part, rev'd in part on other grounds, 980 F.2d 138 [2d Cir. 1992]; *New York State Nat'l Org. for Women v. Terry, supra*, 737 F. Supp. at p. 1361 [rates of $ 160-$ 210 per hour reasonable in civil rights case, based upon rates charged by major New York City firms with litigation practices].) Accordingly, all partners whose listed billing rates [**66] exceed $ 200 per hour will be compensated

at $ 200 per hour; similarly, all associates whose listed billing rates exceed $ 135 per hour will be compensated at $ 135 per hour.

Additionally, paralegals' time is includable in an award of attorney's fees. (*United States Football League v. National Football League, supra*, 887 F.2d at p. 416. *See Missouri v. Jenkins, supra*, 491 U.S. at pp. 285-86, 109 S. Ct. at pp. 2468-69 [1989] ["the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys."]) The Court compensates plaintiffs' counsel for the work performed by paralegals at a rate of $ 50 per hour. (*See Aetna Casualty and Surety Co. v. Namrod Devel. Corp.*, No. 91-1609, 1992 U.S. Dist LEXIS 17843 [S.D.N.Y. Nov. 24, 1992] (work performed by paralegals compensated at rate of $ 55 per hour]; *Lewis v. Tuscan Dairy Farms, Inc.*, No. 87-7607, 1992 U.S. Dist. LEXIS 13244 (S.D.N.Y. Sept. 3, 1992) (approximate rate for work performed by paralegals is $ 50 per hour]; *Kahn v. General Motors, Corp.*, No. 88-2982, 1992 U.S. Dist. LEXIS 12191 [**67] (S.D.N.Y. Aug. 14, 1992] (work performed by paralegals compensated at rate of $ 55 per hour].)

Similarly, the Court finds that the amount of hours for which plaintiffs' counsel seeks compensation, specifically, 4,800 hours spent by attorneys and 1,500 hours spent by paralegals on this case, is unreasonable. In *Huntington Branch NAACP v. Town of Huntington*, 749 F. Supp. 62 (E.D.N.Y. 1990), a case similar to the instant matter, counsel sought to recover for 2359.75 hours of work performed over a period of nine years, including a trial, various motions, both pre- and post-trial, and the entry of judgment. (*See also* other proceedings at 961 F.2d 1048 [2d Cir. 1992]; 844 F.2d 926 [2d Cir. 1988]; 689 F.2d 391 [2d Cir. 1982]; 762 F. Supp. 528 [E.D.N.Y. 1991]; 749 F. Supp. 62 [E.D.N.Y. 1990]; 668 F. Supp. 762 [E.D.N.Y. 1987; 530 F. Supp. 838 [E.D.N.Y. 1981].) Giving plaintiffs' counsel every benefit of the doubt, the Court cannot view the expenditure of 4,800 attorney-hours [**68] and another 1,500

paralegal-hours as necessary or reasonable. Upon an examination of plaintiffs' counsel's papers and the attached records, the Court finds that a twenty-five percent reduction of counsel's hours to be reasonable: to 3,600 for attorneys, spread evenly among partners and associates, and 1,125 for paralegals. Based upon these hours and the above rates, the lodestar figure computes to $ 507,195.00.

Central to an application for attorney's fees is the submission of time records reflecting the hours expended by counsel in pursuing the successful claims of their client. In order for a party to recover attorney's fees, such time records must be made contemporaneously with the associated work. (*See Lewis v. Coughlin*, 801 F.2d 570, 577 [2d Cir. 1986].) Furthermore, "these records should specify, for each attorney, the date, the hours expended, and the nature of the work done." (*New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 [2d Cir. 1983].) "The burden is on counsel to keep and present records from which the court may determine the nature of the work done, the need for it, and [**69] the amount of time reasonably required; where adequate contemporaneous records have not [*290] been kept, the court should not award the full amount requested." (*F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1265 [2d Cir. 1987] [applying New York State law and noting that the Second Circuit rule is similar to that of New York]; *see also Soler v. G&U Inc.*, 801 F. Supp. 1056 [S.D.N.Y. 1992].)

Plaintiffs' counsel submitted a computer printout which comprises its documentation in support of the plaintiffs' fee application. Jakabovitz contends that the descriptions contained in the printout are too vague and insufficient to support a fee application.

The following is a list of some of the descriptions contained in the printout: "staff meeting"; "talk w/SAP, Bove, P. Spiro"; "processed documents"; "tc w/Sheinfeld, Lorin, Wolf; meet w/JJ re docs"; "confs w/MRH; meeting w/Luckett". Similarly vague and

cryptic descriptions can be found throughout counsel's computer records.

While vague descriptions such as those listed above are not fatal to a fee application, courts in this Circuit have reduced fee awards due to the [**70] lack of specificity in time records. (*See United States Football League v. National Football League, supra,* 887 F.2d at p. 415; *New York State Ass'n for Retarded Children, Inc. v. Carey, supra,* 711 F.2d at p. 1146; *Soler v. G&U, Inc., supra,* 801 F.2d at pp. 1060-61; *Nu-Life Constr. Corp. v. Board of Educ., supra,* 795 F. Supp. at p. 607; *Meriwether v. Coughlin,* 727 F. Supp. 823, 827 [S.D.N.Y. 1989].)

In light of the numerous entries which contain insufficient descriptions of the work done and the need for it, the Court reduces the lodestar amount by thirty percent. (*See Nu-Life Constr. Corp. v. Board of Educ, supra,* 795 F. Supp. at p. 607 [thirty percent reduction for vague entries]. *See also United States Football League v. National Football League, supra,* 887 F.2d at p. 415 [thirty percent reduction due to, inter alia, vague entries]; *New York State Ass'n for Retarded Children, Inc. v. Carey, supra,* 711 F.2d at p. 1146 [5%-20% reductions [**71] made to multiple claims for fees upon objections to duplicative and excessive hours]; *Meriwether v. Coughlin, supra,* 727 F. Supp. at pp. 831 [15% reduction for entries too vague to assess reasonableness].)

Furthermore, as Jakabovitz argues, the plaintiffs cannot recover attorney's fees for McCoggle's unsuccessful claims. "Work that is based on different facts and legal theories than a successful one may not be included in the fee award." (*United States Football League v. National Football League, supra,* 887 F.2d at p. 413 [citing *Hensley v. Eckerhart, supra,* 461 U.S. at p. 434-35, 103 S. Ct. at p. 1939-40.) However, a plaintiff's various claims may be based upon a common set of facts or similar legal theories. In such an instance, it would be impractical to divide the hours on a claim-by-claim basis, as a large portion of the attorney's time will likely have been spent

on the case as a whole, rather than on individual claims. Under these circumstances, a district court "should focus on the significance of the overall relief obtained by the plaintiff. [citation omitted] [**72] Where a plaintiff has achieved only partial or limited success, full compensation of attorney's fees would not be reasonable. [citation omitted] The district court may either attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." (*United States Football League v. National Football League, supra,* 887 F.2d at p. 414 (citation omitted).)

While the plaintiffs did not succeed on McCoggle's claims, they did obtain significant relief. A further substantial reduction on this basis is unwarranted. Because it would be impractical to scrutinize the computer printout for hours spent on McCoggle's claims, due to the fact that much of plaintiffs' counsel's work was spent on all of the plaintiffs' claims rather than one or two claims in particular, the Court further reduces the lodestar amount by ten percent.

For the above reasons, the Court reduces the lodestar by a total of forty percent. Consequently, the Court awards the plaintiffs the sum of $ 304,317.00 for attorney's fees.

The Court has reviewed the defendants' other objections to the plaintiffs' application [*291] for counsel fees [**73] and finds them to be without merit. Many of their arguments are the same as those in opposition to the motion for equitable relief, and have already been rejected by the Court. The Court similarly rejects Jakabovitz's argument that an award of attorney's fees should be in proportion to the amount of damages awarded, for which he cites a 1981 case from the Northern District of Illinois. The Second Circuit "has consistently rejected the notion that an award of attorney's fees be proportional to the amount of damages recovered. (*Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 160 [2d Cir. 1992].)

With regard to the plaintiffs' application for costs and disbursements, a court will generally award "those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee paying clients." (*Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 [2d Cir. 1987].) "A prevailing party may be reimbursed for expenditures which add to the proceeding and are not part of the attorney's ordinary overhead." (*New York State Nat'l Org. for Women v. Terry, supra*, 737 F. Supp. at p. 1363.) [**74]

The Court has reviewed the affidavits and accompanying cost records submitted by David M. Brodsky, Esq. and Lynn E. Judell, Esq., plaintiffs' counsel, in which they seek $ 92,251.99, including $ 3,900.00 in expert witness fees. The defendants have not challenged the reasonableness of the amount of costs requested.

Under applicable law, the plaintiffs can recover only $ 40 for expert witness fees. (*West Virginia Univ. Hospitals v. Casey*, U.S. 111 S. Ct. 1138, 1148, 113 L. Ed. 2d 68 [1991].) While the Supreme Court's determination that expert witness fees are not subject to shifting was overruled by the 1991 Civil Rights Act, that Act does not govern this case. The plaintiffs cite this Court's decision in *Croce v. V.I.P. Real Estate, Inc.*, 786 F. Supp. 1141 (E.D.N.Y. 1992), for the proposition that the expert witness fees provision of the Civil Rights Act of 1991 should be applied retroactively. Even if *Croce* eventually should be affirmed by the Second Circuit, in that case the Court simply held that the plaintiff could amend her complaint to include a jury demand and a claim [**75] for compensatory damages under the 1991 Act. The plaintiffs in this case never sought to amend their complaint to seek expert witness fees, or bring any claim, under the 1991 Act. Furthermore, the procedural settings of the two cases are entirely different. In *Croce* the plaintiff moved at the outset of the litigation, while this case is in its final stages. Consequently, the Court awards the plaintiffs the sum of $ 40 for expert witness fees.

Moreover, the plaintiffs' list of expenses, like their time records, is rife with vague and cryptic entries. Descriptions of disbursements include simply "car rental and taxi", "air freight Federal Express Corp.", and many entries entitled "miscellaneous". It is wholly unclear which of these expenses, if any, were necessary or related to compensatory activity.

However, the Court credits the manner in which plaintiffs' counsel conducted this case and the good faith which they have shown with respect to these post-trial motions. Consequently, rather than disallow the entire application for costs and disbursements, the Court awards the plaintiffs expenses in proportion to the award of attorney's fees. (*See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1381 [**76] [E.D.N.Y. 1985], aff'd in part and rev'd in part on other grounds, 818 F.2d 226 [2d Cir. 1987].)

The Court above awarded the plaintiffs thirty-five percent of the amount they sought for attorney's fees. Accordingly, the Court awards them thirty-five percent of $ 88,351.99 ($ 92,251.99 less the $ 3,900 for expert witness fees), or $ 30,923.20, plus the sum of $ 40 for expert witness fees, for a total award of costs and disbursements in the sum of $ 30,963.20. The total award of attorney's fees, costs and disbursements to the plaintiffs is the sum of $ 335,280.20.

As to the plaintiffs' contention that the defendants should be held jointly and severally liable for attorneys fees and costs, the allocation of fee liability is a matter committed to this Court's discretion. *Koster v. Perales*, 903 F.2d 131, 139 [2d Cir. 1990].) [*292] Based upon the Court's review of the special verdict sheet, the papers submitted by the parties, the trial transcript, and all of the evidence admitted at the trial, the Court concludes that the allocation to each defendant of a specific percentage of the fee award is equitable and, in fact, required, [**77 based primarily upon the parties' greatly varying degrees of culpability (*see Koster v. Perales, supra*, 903 F.2d at p. 139; *Jose P. v. Ambach*, 669 F.2d 865, 871 [2d

Cir. 1982]), and, secondarily, upon the proportion of time spent litigating against each defendant (*see Koster v. Perales, supra*, 903 F.2d at p. 139 and cases cited therein). Accordingly, the defendants' liability for the award of fees and costs is as follows: Jakabovitz, 60% ($ 201,168.12); Breitman, 20% ($ 67,056.04); Fischler, 12 1/2% ($ 41,910.03); Matos, 5% ($ 16,764.01); and Siegel, 2 1/2% ($ 8,382.00).

CONCLUSION

For the foregoing reasons, the Court (1) grants the plaintiff Open Housing Center's motion for an award of nominal damages against landlord-defendant Breitman; (2) denies landlord-defendant Breitman's motion for "judgment on the verdict"; (3) denies landlord-defendant Jakabovitz's motion to set aside the verdict as to plaintiff Ramsey; (4) grants the plaintiffs' motion for equitable relief against all defendants as described above; and (5) grants the plaintiffs' application for attorney's fees and costs [**78] against all defendants in the total sum of $ 335,280.20 in the percentages set forth above.

The Clerk of the Court is directed to enter judgment in favor of the plaintiffs in accordance with the instructions set forth in this Order.

SO ORDERED.

Dated: Uniondale, New York
February 17, 1993

ARTHUR D. SPATT
United States District Judge

OPPOSITION

BRIEF

No. 94-216

Supreme Court, U.S.
FILED
AUG 31 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JENO JAKABOVITZ,

Petitioner,

—v.—

ORLANDO CABRERA, LINDA MCCOGGLE, JEANETTE RAMSEY, on behalf of themselves, and all others similarly situated, OPEN HOUSING CENTER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID M. BRODSKY
Counsel of Record
LYNN E. JUDELL
LESLIE A. RUBIN
SCHULTE ROTH & ZABEL
900 Third Avenue
New York, New York 10012
(212) 758-0404

Attorneys for Respondent

September 1, 1994

BEST AVAILABLE COPY

29 pp

QUESTIONS PRESENTED

(1) Did the Second Circuit Court of Appeals err in holding not "clearly erroneous" the findings of the jury and the District Court that Jeno Jakabovitz ("Jakabovitz" or the "Petitioner") controlled the actions of, and thereby entered into an agency relationship with, AM Realty Co., given the substantial evidence adduced at trial?

(2) Did the Second Circuit err in declining to reverse a judgment entered upon a verdict of a jury that received instructions that Petitioner concedes were substantively accurate and to which Petitioner posed no objection at trial on the grounds he advances in his Petition?

(3) Did the Second Circuit err in holding not "clearly erroneous" the District Court's denial of Petitioner's post-trial motion to set aside the jury's verdict, when Petitioner failed to move for a directed verdict at trial?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
Parties and Background	1
The Trial	3
Post-Trial Motions	4
The Second Circuit Appeal	6
REASONS FOR DENYING THE WRIT	7
A. The Second Circuit Did Not Err In Determining That The Jury's Finding Of An Agency Relationship Between Petitioner And AM Realty Was Supported By The Evidence	8
B. There Is No Conflict Among The Circuits With Respect To Jury Instructions In A Discrimination Case	12
C. The Court Below Properly Upheld The District Court's Denial Of Petitioner's Untimely Motion To Set Aside The Verdict	14

PAGE

CONCLUSION 19

APPENDIX RA1

Excerpts from Trial Transcript of Cabrera, et. al. v. AM Realty Co., et. al. (United States District Court for the Eastern District of New York No. CV 87-2675) (1992) RA1

TABLE OF AUTHORITIES

Cases	PAGE
Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985)	8
Cabrera v. Fischler, 814 F. Supp. 269 (E.D.N.Y. 1993)	*passim*
Cabrera v. Jakabovitz, 24 F.3d 372, 377 (2d Cir. 1994) ("Jakabovitz") (Pet.App. A-3)	*passim*
Care Travel Co. v. Pan American World Airways, Inc., 944 F.2d 983 (2d Cir. 1991)	13
General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982)	9, 10
General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938)	12
Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970)	15
Pierce v. F.R. Tripler & Co., 955 F.2d 820 (2d Cir. 1992)	16
Russo v. New York, 672 F.2d 1014 (2d Cir. 1982)	15
Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982)	16
Sojak v. Hudson Waterways Corp., 590 F.2d 53 (2d Cir. 1978)	15
Song v. Ives Laboratories, Inc., 957 F.2d 1041 (2d Cir. 1992)	16
St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993)	17, 18

PAGE

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

Texas v. Mead, 465 U.S. 1041 (1984) 12

United States v. Concemi, 957 F.2d 942 (1st Cir. 1992), *aff'd*, 14 F.3d 44 (1st Cir. 1994) 13

United States v. Donovan, 24 F.3d 908 (7th Cir. 1994), *petition for cert. filed*, ___ U.S. ___, No. 94-5520 (Aug. 5, 1994) 13

United States v. Johnston, 268 U.S. 220 (1925) 12

United States v. Piche, 981 F.2d 706 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2356 (1993) 13

Walling v. Holman, 858 F.2d 79 (2d Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989) 15

Williams v. Valentec Kisco, Inc., 964 F.2d 723 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1992) 13

Federal Statutes and Rules

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 1, 4, 14

42 U.S.C. § 1982 ..... 1, 4, 14

42 U.S.C. § 3601 1

Fed.R.Civ.P. 50(b) 14, 15

OPINIONS BELOW

A complete text of all opinions below in this action appears at the Appendix to the Petition for a Writ of Certiorari filed by Petitioner on August 2, 1994.[1]

JURISDICTION

The decision of the Court of Appeals was entered on May 5, 1994 and a motion for a stay pending this Court's determination regarding the Petition for Certiorari was denied on August 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1.

STATUTES INVOLVED

The pertinent text of 42 U.S.C. §§ 1981 and 1982 appears at Pet. 2. The pertinent text of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* appears at Pet. 2-5.

STATEMENT OF THE CASE

Petitioner is a landlord who, a jury found, personally engaged in illegal race discrimination in the rental of one of his apartments, and was held liable for the discrimination practiced by real estate brokers who were his agents. Petitioner now seeks to have this Court review the jury's findings as affirmed by both courts below.

Parties and Background

In 1987, the Open Housing Center ("OHC"), a not-for-profit corporation formed to ascertain the existence of racial discrimination in housing and to provide housing assistance and counseling to residents of the New York metropolitan

---

[1] Citations to the Petition for Certiorari will appear as "Pet. ___." Citations to the Appendix to the Petition will appear as "Pet. App. ___."

area, began an investigation of a real estate agency in Brooklyn. *Cabrera v. Jakabovitz*, 24 F.3d 372, 377 (2d Cir. 1994) ("Jakabovitz") (Pet.App. A-3). That agency—AM Realty Co. ("AM Realty")—had been a defendant in an earlier lawsuit brought by the City of New York, alleging that AM Realty had engaged in a pattern and practice of racial discrimination in the provision of real estate brokerage services in violation of federal, state and local civil rights and fair housing laws. In settlement of that suit, AM Realty, its principals and one of its employees entered into a Consent Decree on August 27, 1984, permanently enjoining them from, among other things, refusing to show, sell, rent or negotiate for the sale or rental of a dwelling to any person because of the person's race, color or national origin. *Jakabovitz*, 24 F.3d at 377 (Pet. App. A-3); *Cabrera v. Fischler*, 814 F. Supp. 269, 282-83 (E.D.N.Y. 1993) ("Fischler") (Pet.App. A-65).

In order to monitor AM Realty's compliance with the Consent Decree, OHC commenced a testing program in February 1987. *Jakabovitz*, 24 F.3d at 377 (Pet.App. A-3). The testing program, which continued through July 1987, relied on paid black, Hispanic and white testers. *Jakabovitz*, 24 F.3d at 377 (Pet.App. A-3). In the tests, a black or Hispanic tester, posing as an apartment seeker, went to AM Realty's offices to inquire about renting an apartment in a particular neighborhood in Brooklyn. Shortly after the black or Hispanic tester left AM Realty's offices, a white tester arrived, making the same inquiry regarding available apartments. Sometimes the white tester arrived first, but both testers presented essentially the same "profile"—similar age, family composition and income. *Jakabovitz*, 24 F.3d at 377 (Pet. App. A-3).

OHC's tests revealed that AM Realty, through its brokers, was violating the Consent Decree by continuing to discriminate against black and Hispanic apartment seekers. Without exception, the white testers were given apartment listings in the neighborhoods they requested. The black and Hispanic testers, on the other hand, were given inferior service and

denied truthful housing information and opportunities. *Jakabovitz*, 24 F.3d at 377-78 (Pet.App. A-3).

As a result of the tests, OHC discovered the names of the landlords who used AM Realty's services, including Petitioner Jakabovitz. *Jakabovitz*, 24 F.3d at 378 (Pet.App. A-4). Using that information, OHC conducted "second stage" tests, in which pairs of testers visited the landlords (including Petitioner) and requested apartments directly. *Jakabovitz*, 24 F.3d at 378 (Pet.App. A-4). The second stage tests revealed that Petitioner, among others, engaged directly in discriminatory practices. *Jakabovitz*, 24 F.3d at 378 (Pet.App. A-4).

Based on the pattern of discrimination revealed in the tests, OHC and a class of black and Hispanic plaintiffs brought suit in the United States District Court for the Eastern District of New York against AM Realty, its principals and employees and the landlords that used AM Realty's services, including Petitioner. *Jakabovitz*, 24 F.3d at 379 (Pet.App. A-7). The answers filed by each of the defendants generally denied the material facts of the complaint, but AM Realty and each of the individual brokers admitted that they had acted as agents for Petitioner and the other named defendant landlords. *Jakabovitz*, 24 F.3d at 387 (Pet.App. A-23).

The Trial

Trial before District Judge Arthur D. Spatt and an eleven person jury lasted approximately two weeks. *Fischler*, 814 F. Supp. at 273 (Pet.App. A-43). Plaintiffs sought to establish Petitioner's liability based on his agency relationship with AM Realty and on the direct test of Petitioner conducted by Phyllis Spiro and Jeanette Ramsey, described *infra*. After two days of deliberations, the jury, responding by special verdict, found with respect to Petitioner that:

1) AM Realty had acted as an agent for Petitioner;

2) two employees of AM Realty had illegally discriminated against three of the minority testers (two of

whom were denied truthful housing information concerning apartments owned by Petitioner); and

3) Petitioner had discriminated directly against Jeanette Ramsey, a black tester and named plaintiff, in violation of the Fair Housing Act and 42 U.S.C. §§ 1981 and 1982.

Fischler, 814 F. Supp. at 273 (Pet. App. A-43). The jury awarded OHC a total of $15,350 in compensatory and punitive damages and awarded named plaintiffs Jeanette Ramsey and Orlando Cabrera $1.00 each in nominal damages. *Fischler*, 814 F. Supp. at 273 (Pet.App. A-44).

Post-Trial Motions

Upon entry of the verdict, plaintiffs submitted to the district court an Application for Attorneys' Fees and a Motion for Equitable Relief. *Fischler*, 814 F. Supp. at 274 (Pet.App. A-45). The court awarded plaintiffs a total of $335,280.20 in attorneys' fees and costs, and also awarded declaratory, injunctive and affirmative relief against all of the defendants to redress the effects of the defendants' illegal discrimination. *Fischler*, 814 F. Supp. at 282-84 and 291 (Pet.App. A-64 - A-71 and A-85). In particular, the district court declared that Petitioner violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* (the "Fair Housing Act"), the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Civil Rights Act of 1866, 42 U.S.C. § 1982 (*Fischler*, 814 F. Supp. at 282 (Pet. App. A-64 - A-65)) and ordered Petitioner to (1) change his business letterhead to include an "Equal Housing Opportunity" statement and logo; (2) place advertisements in certain newspapers describing his non-discriminatory rental practices; (3) notify each real estate broker that lists vacancies in his buildings of his non-discrimination policy; (4) place advertisements in *El Diario* and either the *New York Amsterdam News* or the *City Sun* whenever they advertise in any other newspaper; (5) include in each advertisement a statement concerning his non-discrimination policy; (6) place a Fair Housing sign in each of his buildings and offices;

(7) provide OHC with his rental criteria; and (8) maintain an "Applicant Flow Log" for each of his buildings. *Fischler*, 814 F. Supp. at 283-84 (Pet.App. A-66 - A-68).

In addition, the District Court ordered the following equitable relief for two years with respect to seven of the fourteen buildings owned by Petitioner:

(1) Petitioner is to inform OHC of every fourth vacancy that arises in each of such buildings;

(2) For a seven-day period commencing the day after notice is given, OHC shall refer qualified minority apartment seekers to Petitioner;

(3) During the seven-day period, Petitioner shall show vacant apartments to and interview *only* the candidates referred by OHC and shall refrain from advertising the apartment in any newspaper, magazine or other media;

(4) If Petitioner rejects a prospective tenant referred by OHC, he must inform OHC and the applicant of the basis for the rejection;

(5) If, at the conclusion of this seven-day period, the apartment has not been rented to an applicant referred by OHC, Petitioner may rent the apartment in his usual fashion.

Fischler, 814 F. Supp. at 284 (Pet.App. A-69 - A-70).

Although Petitioner had not moved at trial, either orally or in writing, for a directed verdict, he nevertheless made a post-trial motion "to set aside the jury's verdict with respect to plaintiff Ramsey." *Fischler*, 814 F. Supp. at 275 (Pet.App. A-48). That motion was made approximately three weeks after the jury rendered its verdict. *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19). The district court construed Petitioner's motion as one for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), and denied it because there was "no indication of [Petitioner] having moved for judgment as matter of

law with regard to Ramsey's claims" at the close of plaintiffs' case. *Fischler*, 814 F.3d at 280 (Pet.App. A-59).[2]

The Second Circuit Appeal

Petitioner appealed the district court judgment to the Second Circuit. First, Petitioner maintained that the district court erred in submitting the question of agency to the jury, arguing that, because Petitioner did not pay AM Realty for its services, as a matter of law no agency relationship could possibly have existed between himself and AM Realty. *Jakabovitz*, 24 F.3d at 387 (Pet. App. A-25). Second, Petitioner argued that the district court erred in its jury instructions regarding the law of agency because it declined to instruct the jury that Petitioner had to have authorized AM Realty to discriminate in order to be held liable. *Jakabovitz*, 24 F.3d at 388-89 (Pet. App. A-27). Third, Petitioner challenged the district court's jury instructions regarding the burdens of proof in a discrimination case. *Jakabovitz*, 24 F.3d at 380 (Pet. App. A-9). And fourth, Petitioner argued that the district court erroneously denied his motion to set aside the verdict, since he had presented evidence that the apartment not offered to Ramsey was unavailable, which plaintiffs had failed conclusively to rebut. *Jakabovitz*, 24 F.3d at 384-85 (Pet.App. A-18 - A-19).

The Second Circuit affirmed the judgment of the district court in all relevant respects, holding, *inter alia*, that (1) the district court properly submitted the agency issue to the jury as a mixed question of law and fact (*Jakabovitz*, 24 F.3d at 385 (Pet.App. A-21)); (2) there was "ample evidence" to support the jury's finding of agency (*Jakabovitz*, 24 F.3d at 387 (Pet.App. A-24)); (3) the jury instructions on the issue of agency were not clearly erroneous (*Jakabovitz*, 24 F.3d at 388-89 (Pet. App. A-28)); (4) the jury charge regarding the

---

[2] Petitioner inaccurately represents to this Court that, "[d]uring the trial [he] moved in writing for a directed verdict." (Pet. 8) The Second Circuit pointed out that Petitioner's only motion for a directed verdict was made *before trial began*. *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19)

McDonnell Douglas burden shifting framework, as a whole, properly apprised the jury that the plaintiff bore the burden of establishing discrimination (*Jakabovitz*, 24 F.3d at 384 (Pet.App. A-17)); and (5) after establishing a *prima facie* case of discrimination against Petitioner, plaintiffs were not required to present more evidence to rebut Petitioner's offer of a nondiscriminatory reason for his actions, where the jury found the proffered evidence as incredible on its face (*Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19 - A-20)).

The Second Circuit also expressed its preference for avoiding the use of technical language in jury instructions regarding the burdens of proof in discrimination cases. *Jakabovitz*, 24 F.3d at 381 (Pet.App. A-10 - A-11). In dicta, the Second Circuit explained that references to a "prima facie" case and to the defendant's burden of production create a "distinct risk of confusing the jury" and should therefore be avoided. *Jakabovitz*, 24 F.3d at 381 (Pet.App. A-10 - A-11). Petitioner seizes upon that language to argue, for the first time, that the district court's use of technical legal terms in an otherwise unobjectionable instruction "mandate[s] reversal." (Pet. 19)

REASONS FOR DENYING THE WRIT

The Petition seeks this Court's review of purely factual findings by a jury that Petitioner entered into an agency relationship with AM Realty and that he personally discriminated against plaintiff Jeanette Ramsey. It also seeks reversal of the district court's concededly accurate jury instructions, despite Petitioner's failure to object to the instructions at trial on the grounds he advances here. The Petition should therefore be denied.

A. The Second Circuit Did Not Err In Determining That The Jury's Finding Of An Agency Relationship Between Petitioner And AM Realty Was Supported By The Evidence

In an effort to create the mirage of a legal issue warranting this Court's attention, and in a desperate, last-ditch attempt to avoid having to rent a small percentage of his apartments to financially qualified black and Hispanic renters, Petitioner flagrantly mischaracterizes the Second Circuit's affirmance of the district court's judgment as having "eliminated the need for factual evidence of 'control' in demonstrating the existence of an agency relationship." (Pet. 9) According to Petitioner, "never before has a landlord been held vicariously liable for the discriminatory acts of an independent real estate broker without actual evidence establishing that the landlord controlled the actions of the broker." (Pet. 9) In fact, the Second Circuit held nothing of the kind. Rather, it determined that the jury's finding of control was amply supported by the evidence.[3]

Indeed, the Second Circuit described in detail the substantial evidence adduced at trial that supported the jury's finding that Petitioner controlled the actions of AM Realty in connection with the rental of his apartments. The court explained:

> Jakabovitz supplied AM Realty with listings of vacant apartments with the understanding that AM Realty would refer prospective tenants to him for those apartments. Jakabovitz instructed AM Realty to refer only those applicants who met his income requirements (namely, that a tenant's weekly income equalled or exceeded his

---

[3] In so doing, the Second Circuit clearly understood its role as an appellate court. *See Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 493 (2d Cir. 1985) (" 'We may not weigh conflicting evidence, judge the credibility of witnesses, or substitute our judgment for that of the jury. Rather, we are bound to view the evidence . . . in the light most favorable to the prevailing party' ") (citation omitted).

> or her monthly rent) and also his criteria for the number of persons occupying an apartment (roughly, no more than two persons in a studio, and no more than three in a one bedroom apartment). Jakabovitz provided copies of his rental application forms to AM Realty, and AM Realty employees often personally delivered completed application forms to Jakabovitz's office. On those occasions when Jakabovitz was unavailable, leases would be signed in AM Realty's offices, and AM Realty would accept the rent and security deposit on Jakabovitz's behalf. Realty brokers set up appointments for Jakabovitz to meet with prospective applicants, even at times driving applicants to Jakabovitz's office. When Jakabovitz accepted a rental application from a person referred by AM Realty, AM Realty brokers would contact the applicant to tell him or her that the application had been approved.

Jakabovitz, 24 F.3d at 386 (Pet.App. A-22 - A-23).

Contrary to Petitioner's assertion, the Second Circuit did not hold that agency can now be deemed to exist as a matter of law merely from "one party's power to withhold future business from another." (Pet. 9) Rather, the Second Circuit found that plaintiffs had presented sufficient evidence at trial to support the jury's finding that Petitioner had manifested a desire to have AM Realty act on his behalf in renting his apartments; that Petitioner controlled AM Realty's activities in referring applicants for his apartments; and that AM Realty had accepted this agency. *Jakabovitz*, 24 F.3d 386-87 (Pet.App. A-22 - A-24). The Second Circuit did not suggest that an agency relationship may be established in the absence of control by the principal.

Petitioner further asserts that the Second Circuit's decision "runs counter to the principles established by this Court in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982)." (Pet. 11) Petitioner is wrong.

In *General Building* this Court held that "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and consent by the other so to act." *General Building*, 458 U.S. at 392. Indeed, that is precisely the language used by the district court in instructing the jury on the issue of agency,[4] and that is precisely what the Second Circuit held in this case. *Jakabovitz*, 24 F.3d at 387 (Pet.App. A-24) (agency is a legal concept that depends upon the existence of certain factual elements: "manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking").

As explained above, the Second Circuit found that substantial evidence supported the jury's determination that Petitioner manifested a desire for AM Realty to act on his behalf and subject to his control and that AM Realty had consented to so act. Accordingly, far from being a radical departure from existing law, the decision of the Second Circuit is entirely consistent with *General Building* and with well-established common law agency principles.

Petitioner places undue emphasis on the district court's statement that "this case may be the first in which a jury has held a landlord liable for the discriminatory acts of independent real estate agents acting on behalf of the landlord." *Fischler*, 814 F. Supp. at 273-74 (Pet.App. A-45). While perhaps true, that statement has no legal significance. An agency relationship can arise in an infinite number of factual circumstances provided that the required elements are established, *i.e.*, "manifestation by the principal that the agent shall act for him, the agent's acceptance of that undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Jakabovitz*, 24 F.3d at 387 (Pet.App. A-24). Accordingly, a finding of agency in a landlord-broker

---

[4] A copy of the district court's jury instructions on the agency issue are annexed hereto.

relationship does not *per se* constitute a departure from existing law.

Petitioner also complains that "the doctrine of non-delegable duty is not a legally sufficient ground for imposing liability upon a landlord for the acts of the independent broker." (Pet. 15) However, that issue is not raised in this case because it was not a basis for the liability imposed on Petitioner below. The Second Circuit made it very clear that its decision did not rest on principles of "non-delegable duty." *Jakabovitz*, 24 F.3d at 388 n. 16 (Pet.App. A-27, n.16) ("Because we decide that the landlords are liable for AM Realty's discrimination under traditional doctrines of *respondeat superior*, we do not need to consider whether they might also be liable because landlords may have a non-delegable duty not to discriminate"). Petitioner therefore seeks review of a determination that was not made.

Petitioner further contends that the Second Circuit's holding "conflicts with the public policy of the Fair Housing Act and the laws of the State of New York, both of which favor the use of real estate brokers to facilitate the rental and purchase of property." (Pet. 16) However, Petitioner has not identified any public policy favoring the use of real estate brokers to promote racial discrimination in housing. Moreover, as the Second Circuit explained, the holding in *Cabrera v. Jakabovitz* is not intended to and will not likely harm the legitimate business of renting apartments. It will merely increase the potential costs to landlords of using brokers who discriminate on the basis of race, and will encourage landlords to be more diligent in supervising the brokers who work at their direction and for their benefit to ensure that they do not engage in illegal discrimination in the rental of the landlords' apartments. *Jakabovitz* 24 F.3d at 388 (Pet.App. A-26 - A-27). Thus, the decision of the Second Circuit will in fact further the policies of the Fair Housing Act and the Civil Rights laws by promoting greater compliance with those laws.

In the final analysis, Petitioner's argument boils down to one thing: Petitioner disagrees with the jury's finding of

agency and seeks to have this Court review the facts underlying that finding. Such a request is inappropriate and must be denied. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (" 'We do not grant a certiorari to review evidence and discuss specific facts' "), *quoting United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it").

B. There Is No Conflict Among The Circuits With Respect To Jury Instructions In A Discrimination Case

Petitioner seizes upon dicta in the Second Circuit's opinion, not only to manufacture a non-existent conflict among the Circuits, but to argue for reversal of the Second Circuit's decision.

As explained above, in discussing the *McDonnell Douglas* burden shifting framework, the Second Circuit observed that phrases such as "prima facie" case and "burden of production" are unfamiliar to juries, and that courts using these terms in instructing juries run the risk of creating confusion. It therefore offered general advice as to ways in which district courts can simplify *McDonnell Douglas* jury instructions to make them more comprehensible to lay persons. *Jakabovitz*, 24 F.3d at 381 (Pet.App. A-10 - A-11).

Petitioner argues that the Second Circuit's preference for "plain English" jury instructions has created "considerable disagreement among the Circuit Courts with respect to how a jury should be instructed and what its functions are under the *McDonnell Douglas* framework." (Pet. 17) According to Petitioner, the Second Circuit's holding is in conflict with decisions of other Circuits that, he claims, have embraced the use of technical legal terms in explaining the *McDonnell Douglas* burden shifting framework.

In fact, however, there is no conflict among the Circuits on this point. It is undisputed, and indisputable, that the Circuits are in full accord as to the substance and application of the *McDonnell Douglas* framework; there is no divergence of views regarding the parties' burdens of proof in a discrimination case; and there is no contention in the Petition that the jury received erroneous instructions or failed to apply the law. Different Circuits, however, have different preferences for the best words to use in explaining *McDonell Douglas*.[5]

There can exist many different approaches to framing jury instructions in discrimination cases. But different approaches do not create a conflict as long as the approaches accurately reflect the law. Indeed, although Petitioner states conclusorily that "[t]his Court needs to resolve this ongoing conflict among the circuits on this important Federal Question," (Pet. 18) he does not, and cannot, explain what injury will result if the alleged "conflict" is not resolved. Moreover, Petitioner does not cite one case in which this Court granted certiorari to review the wording of a concededly accurate jury instruction.

---

[5] Moreover, there is no dispute among any of the Circuits that judges have broad discretion in instructing juries. *See United States v. Concemi*, 957 F.2d 942, 945 (1st Cir. 1992) ("The district court's decision . . . how to instruct the jury, falls within the court's broad supervisory discretion") (citations omitted), *aff'd*, 14 F.3d 44 (1st Cir. 1994); *Care Travel Co. v. Pan American World Airways, Inc.*, 944 F.2d 983, 996 (2d Cir. 1991) ("[A] trial court has discretion in the style and wording of jury instructions") (citation omitted); *United States v. Piche*, 981 F.2d 706, 712 (4th Cir. 1992) ("The district court has considerable discretion in choosing the specific wording of instructions"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2356 (1993); *United States v. Donovan*, 24 F.3d 908, 917 (7th Cir. 1994) ("the trial judge is given substantial discretion with respect to the specific wording of the instruction") (citation omitted), *petition for cert. filed*, ___ U.S. ___, No. 94-5520 (Aug. 5, 1994); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.) ("the form and language of jury instructions are committed to the sound discretion of the district judge so long as the jury is correctly instructed on the substantive issues in the case"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1992).

Petitioner further contends that the district court's use of technical language in the jury instructions "mandate[s] reversal." (Pet. 19) This argument is specious for at least two reasons. First, Petitioner did not object at trial to the district court's use of technical or legalistic terms in its charge to the jury. Nor did Petitioner raise the issue on appeal; the Second Circuit made its observations *sua sponte*. Petitioner has raised the issue for the first time before this Court. Accordingly, his claim that he was denied due process because the district court used technical terms in its jury charge is disingenuous.

In any event, the Second Circuit held that the district court's charge "as a whole properly apprised the jury that the plaintiff bore the burden of establishing discrimination" and "repeatedly made clear the plaintiff's burden of proof" (*Jakabovitz*, 24 F.3d at 383 (Pet.App. at A-15)), and Petitioner does not challenge that finding. Although the district court used technical legal terms now disfavored by the Second Circuit, its instructions to the jury were entirely correct and consistent with *McDonnell Douglas*. Indeed, other than the district court's use of technical language, Petitioner does not complain of any errors in the jury charge. Accordingly, the Second Circuit properly found that the district court's instructions to the jury concerning the shifting of burdens under the *McDonnell Douglas* framework were not "clearly erroneous."

C. The Court Below Properly Upheld The District Court's Denial Of Petitioner's Untimely Motion To Set Aside The Verdict

As stated above, approximately three weeks after the jury found him liable for race discrimination under the Fair Housing Act and §§ 1981 and 1982, Petitioner moved to "set aside the verdict as to plaintiff Ramsey." *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19). Since there is no such thing as a "motion to set aside the verdict," the District Court construed Petitioner's motion as a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). *Fischler*, 814 F. Supp. at 280 (Pet.App. A-59). It then denied the motion because there was "no indi-

cation of Jakabovitz having moved for judgment as a matter of law with regard to Ramsey's claims" at the close of plaintiffs' case. *Fischler*, 814 F. Supp. at 280 (Pet.App. A-59).

Petitioner does not dispute that a motion pursuant to Rule 50(b) may not be granted after the jury has rendered its verdict, unless such a motion was made by that party at the close of all the evidence.[6] Petitioner claims to have complied with this rule. However, there is no evidence in the record to support Petitioner's assertion that he "moved in writing for a directed verdict" at trial. *Jakabovitz*, 24 F.3d at 380 (Pet.App. 8) In fact, both the district court and the Second Circuit rejected that claim. *Fischler*, 814 F. Supp. at 280 (Pet.App. A-59) ("there is no indication of Jakabovitz having moved for judgment as a matter of law with respect to Ramsey's claims, as is required . . . . Accordingly, Jakabovitz's motion to 'set aside the verdict as to Ramsey' is denied"); *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19) (Although Jakabovitz filed a written motion on April 28, 1992, "Jakabovitz fails to note that the motion was made not just before the case went to the jury, but *before trial began*") (emphasis in original).

Notwithstanding Petitioner's failure to preserve his right to such relief, the Second Circuit addressed Petitioner's Rule 50(b) argument on the merits. *Jakabovitz*, 24 F.3d 385 (Pet.App. A-19) ("Rather than deciding whether the trial court should have treated that motion as a timely Rule 50(a) pleading, we prefer to dispose of Jakabovitz's insufficiency claim

---

[6] *See Walling v. Holman*, 858 F.2d 79, 82 (2d Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989) ("Appellants are precluded from challenging the sufficiency of the evidence because they failed to move for a directed verdict at trial in accordance with Fed.R.Civ.P. 50(b)") (citations omitted); *Russo v. New York*, 672 F.2d 1014, 1021 (2d Cir. 1982) ("the trial court can entertain . . . a motion [for j.n.o.v.] only if the party previously moved for a directed verdict"); *Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54 (2d Cir. 1978) ("Rule 50(b) allows a judgment n.o.v. to be granted only if the moving party requested a directed verdict before the submission of the case to the jury"); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816 (2d Cir. 1970) ("The rule is firmly entrenched that only parties who have moved for a directed verdict may seek the benefit of a judgment n.o.v.").

on the merits"). The Second Circuit properly affirmed the district court's denial of Petitioner's motion.

It is axiomatic that judgment as a matter of law is appropriate only when the "evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992). In reviewing the denial of a motion for judgment as a matter of law, the test is "whether the evidence presented at trial, taken in the light most favorable to the prevailing party, was sufficient to allow a reasonable juror to arrive at the challenged verdict." *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 824 (2d Cir. 1992). *See also Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

Applying that standard, the Second Circuit found that the evidence adduced at trial supported the jury's finding of liability against Petitioner. *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-20). Plaintiffs presented abundant evidence from which a reasonable juror could find that Petitioner denied plaintiff/tester Jeanette Ramsey truthful information about the availability of an apartment because of her race. First, Phyllis Spiro, a white tester, testified that when she visited his office, Petitioner gave her information about an available one-bedroom apartment in an area she requested and asked if she was interested in viewing an apartment in another predominantly white area that she did not request. *Jakabovitz*, 24 F.3d at 379 (Pet.App. A-6). Ms. Ramsey, the black tester, then testified that on the same day, less than an hour later, Petitioner told her that he had no apartments available in the areas she requested, but asked her if she would be interested in an apartment in "Cypress," a neighborhood later identified by plaintiffs' expert witness as predominantly black and Hispanic. She also testified that Petitioner never inquired as to the size apartment she wanted or the amount of rent she was willing to pay. *Jakabovitz*, 24 F.3d at 379 (Pet.App. A-6).

Petitioner did not contradict or deny any part of Ms. Spiro's or Ms. Ramsey's testimony. Rather, he attempted to demonstrate, through evidence the jury eventually rejected as incredible, that the apartment offered Ms. Spiro became unavailable immediately before Ms. Ramsey visited his office, and then suddenly became available again two days later. Furthermore, Petitioner admitted on cross-examination that in 1987 there were no black tenants living in any of the buildings he owned in the predominantly white areas at issue. *Jakabovitz*, 24 F.3d at 379 (Pet.App. A-7).

In upholding the jury's verdict, the Second Circuit rejected Petitioner's argument, repeated here, that once he offered evidence in response to plaintiffs' *prima facie* case, the court was required to enter judgment as a matter of law unless plaintiffs could prove through direct evidence that the proffered evidence was pretextual. Citing *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), Petitioner argues that "[p]laintiffs did not submit any actual evidence of availability [of the apartment denied to the black tester] and relied exclusively on the presumption of continuity [which] disappeared once Jakabovitz offered contrary evidence. At that point, plaintiffs had to offer actual proof of availability or face judgment against them as a matter of law." (Pet. 20 n. 21) Petitioner, of course, did not make plaintiffs' proof "disappear"; he offered an explanation that the jury rejected. Petitioner's liability was thus established without the need to offer yet more evidence.

The Second Circuit correctly found that Petitioner's argument grossly misstates the law. *Hicks* does not require a plaintiff to adduce additional evidence, beyond that presented in the plaintiff's *prima facie* case, after the defendant has proffered evidence of a nondiscriminatory reason for his or her action. Specifically, the Second Circuit relied on Justice Scalia's statement in *Hicks* that, upon rejection of the defendant's proffered reasons for its action, " 'no additional proof of discrimination is required.' " *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19) (*quoting Hicks*, 113 S. Ct. at 2749). The

Second Circuit therefore concluded that plaintiffs "did not fail to offer sufficient evidence of discrimination by not presenting more evidence after Jakabovitz endeavored to provide a nondiscriminatory reason for its actions." *Jakabovitz*, 24 F.3d at 385 (Pet.App. A-19 - A-20).

The Second Circuit's decision is not only supported by a plain reading of *Hicks*, but is entirely consistent with prior precedent of this Court holding that a plaintiff may meet its ultimate burden of persuasion "by showing that the [defendant]'s proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (citation omitted). A factfinder's determination that the reasons put forward by the defendant are pretext, together with the elements of the prima facie case, may support a finding of intentional discrimination. *Hicks*, 113 S. Ct. at 2749. *See also Burdine*, 450 U.S. at 255 n. 10 ("there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation").

The jury's finding that Petitioner discriminated against Jeanette Ramsey in violation of §§ 1981 and 1982 and the Fair Housing Act was thus well-supported by the evidence. As the Second Circuit explained:

> The jury's verdict holding Jakabovitz liable for discriminating against Ramsey demonstrates that the jury believed that Jakabovitz's explanation was pretextual. The jury may have felt that Jakabovitz's claim that the apartment was no longer available when Ramsey arrived was unbelievable . . . .

Jakabovitz, 24 F.3d at 385 (Pet.App. A-20). Accordingly, the Second Circuit did not err in upholding the district court's denial of Petitioner's motion for a directed verdict.

CONCLUSION

Because Petitioner seeks review of findings of fact supported by sufficient evidence and presents no legitimate conflict among the Circuits warranting this Court's resolution, the Petition should be denied.

Respectfully submitted,

David M. Brodsky*
Lynn E. Judell
Leslie A. Rubin

SCHULTE ROTH & ZABEL
900 Third Avenue
New York, New York 10012
(212) 758-0404

* *Counsel of Record for Respondents*

APPENDIX

APPENDIX

Excerpts from Trial Transcript of Orlando Cabrera, et. al. v. AM Realty Co., et. al. (United States District Court for the Eastern District of New York No. CV 87-2675) (1992)

Jury Charge (May 13, 1992)

Now, next subject. As to the claim by the plaintiffs that the defendant Fischler doing business as Am Realty Co., acted as the "agent," for the landlord Jakabovits and Breitman, I will now instruct you on the law of agency as it applies to the relationship between AM Realty Co., and Jakabovits and Am Realty Co. and Breitman.

How do you determine whether Am Realty Co., the Am Realty Co. salespersons were acting as agents for the landlord for the rental of apartments during this period in 1987? An agent can be appointed only at the will and by the act of the principal. In this case, the alleged principals are Jakabovits and Breitman, the landlords, and the alleged agent is AM Realty Co. As between principal and agent, an agent is created, and authority is actually conferred very much as a contract. It is made to the extent that the creation of the agency results from the agreement between the principal and the agent that such a relation shall exist. The minds of the parties must meet in establishing this agency. Otherwise stated, consent of both principals, landlords, agent, Am Realty, is necessary to create an agency. The names which the parties give to the relationship is not determinative of the existence of an agency. The fact in each indicates must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other.

An agency exist from the time that the consent is manifested until it is terminated by act or agreement or by operation of law.

As between principal and agent, the creation of the agency relationship arises from the consent or agreement of the parties. However, it is not essential that any actual contract should exist or that compensation should be expected by the agent. While the relation, in its full sense, arises out of a contractual or even a gratuitous agreement between the parties, the agency and the consent of the parties may be either expressed or implied.

An agency relationship may be created as a result of the conduct of the parties manifesting that one of them, in this case, the landlord, is willing for the other, the broker, to act for him subject to the control of the landlord, and that the other, namely the broker, Am Realty Co., consents to so act. However, the principal, namely the landlord, must in some manner indicate that the agent is to act for him and the agent must act or agree to act on behalf of the landlord and subject to his control.

An agency may be implied by the words and conduct of the parties construed in the light of all the surrounding circumstances, provided that such construction is natural, and reasonable and the existence of the agency is based upon facts for which the principal is responsible.

As I stated, one of the issues you must decide is whether the defendant landlords are bound by the actions of the Am Realty Co. sales persons who it is claimed by the plaintiffs were acting as the landlord's agents. In deciding this issue, in addition to the law I have already given you, you may consider whether the landlord placed the broker in such a situation that a person of ordinary prudence, familiar with business usages and the nature of the particular business, in this case, the realty business, would be justified in assuming that these sales persons have authority to perform a particular act and that they deal with the apparent agent upon that assumption. From these circumstances, if you find that the individual plaintiffs were justified in assuming that AM Realty Co. sales persons had the authority to act as they did, for the landlord,

then you may find that the defendant landlord is bound by the acts of AM Realty Co., sales persons as his agent.

Where an agent's responsibilities include making statements on his principal's behalf, the agent's statements within the scope of his authority, from the landlords are receivable against the principal.

The burden of proving this agency between AM Realty Co. and the defendant landlord is on the plaintiffs. In this regard, the plaintiffs must establish the existence of the agency by and between the landlords and AM Realty Co. by a preponderance of the evidence.

In your determinations as to whether the plaintiffs have established these agencies, you may consider all the testimony and exhibits bearing on the express or implied or apparent authority of AM Realty Co. to act as an agent for the landlords; you may also consider the control, if any, exercised by the landlords on the actions of the broker and you may consider the admissions in the answer by the various defendants, including the defendant Breitman, the landlords.

If the plaintiff fails to prove the existence of an agency between the broker AM Realty Co. and a landlord, I instruct you you cannot find the landlord to be liable under any of the three statutes involved in this case, based on the actions of a sales person of AM Realty Co.

If, however, the plaintiffs establish by a preponderance of the evidence that at the time of the alleged five incidents at issue, the defendant Fischler, doing business as AM Realty Co. and his sales persons were acting as the agents for a landlord, then that landlord would be liable for the actions of the sales persons with regard to the three statutes involved in this case.

I will now instruct you on the Section 1981 cause of action which is brought by the individual plaintiffs,